

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX FOR APPELLANT AND
JOINT APPENDIX**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,009

FRANK LEWIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

JAN 18 1954

CLERK

Appeal from the Judgment of the Municipal Court of Appeals for
the District of Columbia.

WALTER E. GALLAGHER,
821 Fifteenth Street, N. W.,
Washington 5, D. C.,

MYRON G. EHRLICH,
Columbian Building,
Washington, D. C.,
Counsel for Appellant.

No. 12009

STATEMENT OF QUESTIONS PRESENTED.

1. Are the taxes imposed by Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Sec. 3285, *et seq.*, unconstitutional as applied to the District of Columbia in that they impose penalties in the guise of taxes, inasmuch as the wagering activities sought to be taxed have been heretofore made illegal in the District of Columbia by various Acts of Congress?
2. Are the provisions of Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Section 3285, *et seq.*, unconstitutional as applied in the District of Columbia inasmuch as information is required to be furnished *re* certain wagering activities which have heretofore been made illegal by Acts of Congress and, therefore, compelling the furnishing of said information contravenes the provisions of the Fifth Amendment of the United States in that said information will incriminate or tend to incriminate the person furnishing same.
3. Do the provisions of Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Section 3285, *et seq.*, contravene the provisions of the Fourth Amendment?

INDEX

	Page
Jurisdictional Statement	1
Statement of Case	2
Statutes and Regulations	3, 33
Statement of Points	3
Summary of Argument	3
Argument	8
A. Chapter 27A of the Internal Revenue Code, Title 26, U.S.C., Sections 3285, et seq., is unconstitutional as applied in the District of Columbia in that the wagering activities sought to be taxed have been declared illegal by Acts of Congress and, therefore, Chapter 27A, supra, impose penalties in the guise of taxes	8
B. The provisions of Chapter 27A of the Internal Revenue Code, Title 26, U.S.C., Sections 3285, et seq., contravene the Fifth Amendment of the United States Constitution because the information called for would incriminate or tend to incriminate this defendant of violations of Federal law in the District of Columbia	17
C. The provisions of Chapter 27A of the Internal Revenue Code, specifically Sections 3275 and 3293, contravene the provisions of the Fourth Amendment of the United States Constitution	30
Conclusion	32

CASES

Aiuppa v. United States, 201 F. 2d 287, 300	29
Arnstein v. United States, 54 App. D. C. 199, 296 Fed. 946, cert. denied, 264 U.S. 595	10
Blau v. United States, 340 U.S. 159	25

	Page
Brinegar v. United States, 338 U.S. 160	30
Brown v. Walker, 161 U.S. 591	28
Carroll v. United States, 267 U.S. 132	30
Combs v. Snyder, D.C. D.C. 101 F. Supp. 531, affirmed without opinion, 342 U.S. 939	26
Counselman v. Hitchcock, 142 U.S. 547	26, 28
Dumbra v. United States, 268 U.S. 435	30
Estes v. Potter, 183 F. 2d 865, 868, cert. denied 71 S. Ct. 356, 340 U.S. 920	25
Hoffman v. United States, 71 S. Ct. 814, 818	25
License Tax Cases, 5 Wall. 462, 471	15
Lipke v. Lederer, 259 U.S. 557, 562	9
Mason v. United States, 344 U.S. 365, 366	28
Rogers v. United States, 71 S. Ct. 438	26
Steele v. United States, No. 1, 267 U.S. 498	30
Storey v. Rives, 68 App. D.C. 325, 97 F. 2d 182, cert. denied, 305 U.S. 395	10
United States v. Burr, 25 Fed. Cases, pages 38, 40, No. 14,692e	25, 28
United States v. Doto, 205 F. 2d 416, 418 (2d Cir. 1953)	29
United States v. Five Gambling Devices, et al., 74 S. Ct. 190, 196	18
United States v. Kahriger, 73 S. Ct. 519, 345 U.S. 22. rehearing denied 345 U.S. 931 ..5, 11, 13, 14, 15, 16, 21,	22
United States v. La Franca, 282 U.S. 568, 572	8
United States v. Monia, 317 U.S. 424	26
United States v. Murdock, 281 U.S. 141	26
United States v. One Ford Coupe, 272 U.S. 321, 328 ...	8
United States v. Pechart, 103 F. Supp. 417, 419.....	24
United States v. Raley, 26 Fed. Supp. 495, 496	25
United States v. St. Pierre, 132 F. 2d 837, writ dis- missed, 63 S. Ct. 910, 319 U.S. 41	24
United States v. Sanchez, 340 U.S. 42, 71 S. Ct. 108, 110	9
United States v. Statoff, 260 U.S. 477	8
United States v. Sullivan, 274 U.S. 259	7, 20, 22, 23
United States ex Rel. Vajtaur v. Commissioner, 47 S. Ct. 302, 273 U.S. 103	26
United States v. Yuginovich, 256 U.S. 450, 464	8, 31

STATUTES AND REGULATIONS INVOLVED

Act of October 20, 1951, c. 521, Title IV, : 471(a), 65 Stat. 529, Title 26, U.S.C. Secs. 3285 et seq., Chap. 27A, Internal Revenue Code (Wagering Tax Act)	3, 4, 5, 6, 7, 8, 9, 10, 17, 19, 22, 27, 28, 30, 33, 34
Title 26, U.S.C., Section 3285	3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 23, 33, 34
Title 26, U.S.C., Section 3285	34
Title 26, U.S.C., Section 3287	35
Title 26, U.S.C., Section 3290	2, 4, 5, 6, 7, 11, 12, 13, 14, 17, 19, 20, 21, 28, 35
Title 26, U.S.C., Section 3291	6, 11, 19, 21, 35, 36
Title 26, U.S.C., Section 3292	36
Title 26, U.S.C., Section 3293	3, 30, 31, 36
Title 26, U.S.C., Section 3294	2, 28, 36, 37
Title 26, U.S.C., Section 3297	15, 28, 37
Title 26, U.S.C., Section 3298	37
Title 26, U.S.C., Section 3271	14, 40, 49
Title 26, U.S.C., Section 3275	3, 30, 31, 40
Act of June 25, 1948, c. 645, 62 Stat. 701, Title 18, U.S.C., Sec. 371	7, 20, 40
Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1, Title 22, D.C. Code, Sec. 1501	38
Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D.C. Code, Sec. 1502	39
Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864, Title 22, D.C. Code, Sec. 1503	39
Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22, D.C. Code, Sec. 1508	39
Act of October 28, 1919, c. 85, Sec. 1 et seq. 41 Stat. 305, "National Prohibition Act"	22
Fourth Amendment of the Constitution of the United States	39
Fifth Amendment of the Constitution of the United States	40
Treasury Regulations 132, Section 325.21	10, 41

	Page
Treasury Regulations 132, Section 325.24	10, 41
Treasury Regulations 132, Section 325.25	10, 42
Treasury Regulations 132, Section 325.30	23, 42
Treasury Regulations 132, Section 325.31	23, 42
Treasury Regulations 132, Section 325.32	23, 43
Treasury Regulations 132, Section 325.40	44
Treasury Regulations 132, Section 325.41	11, 19, 44
Treasury Regulations 132, Section 325.42	45
Treasury Regulations 132, Section 325.50	23, 45
Treasury Regulations 132, Section 325.51	23, 46
Treasury Regulations 132, Section 325.52	23, 47
Treasury Regulations 132, Section 325.53	31, 47
Treasury Regulations 132, Section 325.54	47
Treasury Decision 4929, Sec. 463C.32	19, 31, 48
Treasury Decision 4929, Sec. 463C.33	19, 31, 48
Treasury Decision 4929, Sec. 463C.34	19, 31, 48
Treasury Decision 5138, Sec. 458.611	19, 31, 49

MISCELLANEOUS

House Report 586, 82d Cong., 1st Sess., p. 60	12
Senate Report 781, 82d Cong., 1st Sess., p. 118	12
Form 730, Internal Revenue Service	18, 23
Form 11-C, Internal Revenue Service	23
Brief for the United States in case of United States of America v. Kahriger, supra	16
Reply Brief for United States v. Kahriger, supra	21

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12009

FRANK LEWIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the Judgment of the Municipal Court of Appeals for
the District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a decision of the Municipal Court of Appeals for the District of Columbia. Upon petition for allowance of appeal pursuant to Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the Municipal Court of Appeals for the District of Columbia, this Court on December 24, 1953, allowed this appeal to be taken.

STATEMENT OF CASE.

By information filed October 7, 1952 (R. 1-2), the defendant in this case is charged as follows:

“Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December 1951, in the District of Columbia *engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars (\$50.00) as imposed by Section 3290 of Internal Revenue Code*, he failed to pay said tax, all in violation of Section 3294(a) Internal Revenue Code: Title 26, U. S. Code, Section 3294(a) and Section 2707(b) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code.” (Italics supplied)

On October 28, 1952, A Motion to Dismiss this Information was filed. (R-6)

The Municipal Court for the District of Columbia entered an Order on July 24, 1953, sustaining the Motion to Dismiss (R-5), and filed at that time a written Opinion R-9-31). The United States filed a Notice of Appeal on August 3, 1953 (R-32). An Agreed Statement of Proceedings was filed on August 24, 1953 (R-34-35). The Municipal Court of Appeals for the District of Columbia entered an Order on November 6, 1953, reversing the Municipal Court for the District of Columbia and remanding the case (R-44). At the same time, the Municipal Court of Appeals for the District of Columbia filed a written Opinion (R-43). On November 16, 1953, the defendant by his counsel filed a Petition for an Allowance of Appeal. The transcript of the Record from the Municipal Court of Appeals for the District of Columbia was filed with this Court on November 20, 1953. The Petition for an Allowance of Appeal was heard on December 23, 1953, and this appeal was allowed on December 24, 1953.

STATUTES AND REGULATIONS.

As these are lengthy, they are set out in a separate appendix attached hereto.

STATEMENT OF POINTS.

A. Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Sections 3285, *et seq.*, is unconstitutional as applied in the District of Columbia in that the wagering activities sought to be taxed have been declared illegal by Acts of Congress and, therefore, Chapter 27A, *supra*, imposes penalties in the guise of taxes. The lower appellate court erred in holding that the payment of the tax is necessary before the business is entered into (R-43) and concluding, therefore, that Chapter 27A, *supra*, did not impose penalties in the guise of taxes.

B. The provisions of Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Sections 3285, *et seq.*, contravene the Fifth Amendment of the United States Constitution because the information called for would incriminate or tend to incriminate this defendant of violations of Federal law in the District of Columbia. The lower appellate court erred in holding that Chapter 27A, *supra*, requires the furnishing of the information before entering into the business of accepting wagers and, concluding therefore, that there was no incrimination involved (R-43).

C. The provisions of Chapter 27A of the Internal Revenue Code, specifically Sections 3275 and 3293, contravene the provisions of the Fourth Amendment of the United States Constitution. The lower appellate court erred in holding the argument advanced *re* the contravention of the Fourth Amendment to be wholly insufficient to support a ruling of unconstitutionality (R-43).

SUMMARY OF ARGUMENT.

The Supreme Court of the United States on many occasions has stated that where evidence of the commission of a crime is essential to the imposition of a tax, said tax is a

criminal sanction involving the idea of punishment for infraction of the law and is not a true tax but is a penalty in the guise of a tax and is unconstitutional. All of the wagering activities sought to be taxed by the provisions of Chapter 27A, *supra*, have heretofore been made Federal crimes in the District of Columbia by various Acts of Congress. The 10% tax imposed by Section 3285, *supra*, does not and cannot apply until the acceptance of an initial wager. But the acceptance of a wager in the District of Columbia is a Federal crime. Therefore, in the instant case, the 10% tax is conditioned on the commission of a Federal crime and is a penalty in the guise of a tax and is unconstitutional. However, the \$50 occupational tax imposed by Section 3290, *supra*, is conditioned on a liability for the payment of the 10% tax. Since there was no liability on this defendant or others similarly situate in the District of Columbia to pay the 10% tax as it is unconstitutional as applied here, there was no liability for the payment of the \$50 occupational tax. Therefore, this defendant was not in violation of any valid Federal law as charged by the information herein in failing to pay said \$50 occupational tax.

The lower appellate court erred in concluding that the \$50 occupational tax imposed by Section 3290, *supra*, must be paid prior to engaging in the business of accepting wagers, and therefore was not a penalty in the guise of a tax.

However, assuming *arguendo*, that its conclusion was correct, nevertheless the only persons liable for payment of the \$50 occupational tax prior to engaging in the business of accepting wagers would be those who in the future would be liable for the 10% tax imposed by Section 3285, *supra*. As has been stated hereinbefore, neither this defendant nor others similarly situate in the District of Columbia will ever be liable under existing Federal law for the 10% tax which is unconstitutional. Therefore, this defendant did not have to pay the \$50 occupational tax.

Further, that the \$50 occupational tax need not be paid prior to engaging in the business of accepting wagers becomes apparent when it is realized that all special taxes such as the \$50 occupational tax are due either on the first of July of each year or on commencing any trade or business on which such tax is imposed. A reading of the provisions of Chapter 27A, *supra*, reflects that a person is not engaged in the business of accepting wagers until he has at least accepted his first wager and is, therefore, liable for the 10% tax. But the Treasury Department by its regulations has in addition thereto defined the "commencement of business" as meaning the initial acceptance of a wager by a person liable for the 10% excise tax. Since, therefore, no person can be held to have "commenced the business" of accepting wagers until he has accepted his initial wager, the \$50 occupational tax cannot be owing and due until the initial wager has been accepted. Therefore, the \$50 occupational tax is itself conditioned on the commission of a Federal crime in the District of Columbia, to wit, the acceptance of a wager and imposes a penalty in the guise of a tax and is unconstitutional.

The lower appellate court relied on certain language appearing in *United States v. Kahriger*, 73 S. Ct. 519, 345 U. S. 22, rehearing denied, 345 U. S. 931, in arriving at its conclusions but failed to realize that all that the Supreme Court did in that case was to construe the provisions of Chapter 27A, *supra*, as applied to wagering activities *in the states* and never gave any consideration to the application of the Wagering Tax Act on certain wagering activities in the District of Columbia, all of which the Congress of the United States had theretofore made illegal.

The provisions of Chapter 27A, *supra*, are also unconstitutional in that they contravene the provisions of the Fifth Amendment. At the time that the 10% is to be paid, namely, monthly, a special wagering return must be filed contemporaneously therewith listing the gross amount of wagers accepted in the preceding month, tax due, etc. It is submitted that the information contained on such a

form would incriminate or tend to incriminate this defendant or others similarly situate in the District of Columbia of violations of Federal law and, therefore, this provision of Chapter 27A, *supra*, namely, Section 3285, Subchapter A, is unconstitutional. However, as has been pointed out, the \$50 occupational tax imposed by Section 3290, *supra*, is predicated on a liability for the payment of the 10% tax. Accordingly, if the 10% tax provision is unconstitutional in that it contravenes the provisions of the Fifth Amendment, this defendant did not violate any existing Federal law by failing to comply with the provisions of the \$50 occupational tax section, Sec. 3290, *supra*.

In addition thereto, as has been previously pointed out, the \$50 occupational tax is not owing and due until after the acceptance of the initial wager, but at the time that the \$50 occupational tax is to be paid, a return must also be filed accompanying that payment giving therein certain information *re* wagering activities which have heretofore been made illegal under Federal law in the District of Columbia. It is submitted, therefore, that this defendant properly refused to file any such return and give the information called for as the same would have incriminated or tend to have incriminated him of a violation of Federal law and, therefore, contravene the provisions of the Fifth Amendment. Even assuming, *arguendo*, that the lower appellate court was correct in concluding that the \$50 occupational tax and registration contemporaneously therewith must precede engaging in the wagering business, this would only be true in the event that the 10% tax, Section 3285, *supra*, was constitutional. But it has been shown that said section is unconstitutional in that its provisions contravene the Fifth Amendment. Therefore, this defendant did not violate any Federal law in failing to pay the \$50 occupational tax, because the only way that it can be paid is by filing contemporaneously therewith the registration form called for by Section 3291, *supra*. Since the information called for in said registration form would in-

criminate or tend to incriminate this defendant, he correctly refused to file the same.

Further, still assuming, *arguendo*, that the lower appellate court was correct in stating that the registration and payment of the \$50 tax must precede the entrance into the wagering business, there still was no obligation on the part of this defendant to comply with that provision because by so doing he might incriminate or tend to incriminate himself of a violation of Section 371, Title 18, U. S. C. If he agreed with another person to go into the wagering business in the District of Columbia, and one of them took steps to pay the \$50 occupational tax and secure a stamp, such an act would constitute an overt act in furtherance of a conspiracy to violate Federal law, to wit, the anti-gambling statutes of the District of Columbia. Accordingly, he properly refused to pay the \$50 occupational tax and furnish the information required on the form.

The case of *United States v. Sullivan*, 274 U. S. 259, relied on in part by the lower appellate court in arriving at its conclusion, is not in point in the instant case because as the Supreme Court pointed out in the *Sullivan* case, *supra*, "most of the items warrant no complaint" meaning thereby that the items were not incriminatory on their face. To the contrary in the District of Columbia. All of the questions on the returns to be filed pursuant to the provisions of Chapter 27A, *supra*, are incriminatory on their face in the District of Columbia and, therefore, contravene the provisions of the Fifth Amendment. This defendant has not waived his privilege against self-incrimination which, it is submitted, would have been the case had he filed the returns and given the information called for. Further, it is submitted that if the returns had been filed by this defendant, that they could have been introduced into evidence in a subsequent criminal proceeding against him. But even if they were ruled inadmissible, this defendant still had no obligation to furnish said information because there can be no ques-

tion but that the answers called for would at least tend to incriminate him and would furnish links in the chain of evidence against him. Nor can there be any question but that compulsion is present in the provisions of Chapter 27A, *supra*. As is apparent from the instant case, failure to pay the taxes imposed and furnish the information called for will result in prosecution and possible imposition of penalties and punishment. Therefore, all the elements necessary to properly invoke the provisions of the Fifth Amendment are present in the instant case.

Finally, when applied in the District of Columbia the provisions of Chapter 27A, *supra*, contravene the provisions of the Fourth Amendment. Chapter 27A, *supra*, requires certain "postings". Such "postings" would furnish sufficient information to satisfy the requirement of "probable cause" and permit the issuance of search warrants which it could be contended were valid and therefore validated any search or seizure thereunder. However, there would be no "postings" but for the illegal compulsory provisions of Chapter 27A, *supra*.

ARGUMENT.

- A. Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Sections 3285, et seq., is unconstitutional as applied in the District of Columbia in that the wagering activities sought to be taxed have been declared illegal by Acts of Congress and, therefore Chapter 27A, *supra*, imposes penalties in the guise of taxes.**

The Supreme Court of the United States on numerous occasions has enunciated the doctrine that a tax which is conditioned on the commission of a crime is not a true tax but is a penalty in the guise of a tax,¹ and is, therefore, un-

¹ *United States v. Yuginovich*, 256 U. S. 450, 464. *Lipke v. Lederer*, 259 U. S. 557, 562. *United States v. Statoff*, 260 U. S. 477. *United States v. One Ford Coupe*, 272 U. S. 321, 328. *United States v. La Franca*, 282 U. S. 568, 572. *United States v. Sanchez*, 340 U. S. 42, 71 S. Ct. 108, 110.

constitutional. In *Lipke v. Lederer, supra*, the Supreme Court said:

"The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax Case, ante*, 20. When by its very nature the imposition is a penalty, it must be so regarded. *Helwig v. United States*, 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definition function of a penalty. *O'Sullivan v. Felix*, 233 U. S. 318, 324." (page 561, *et seq.*)

In the most recent case decided by the Supreme Court, namely, *United States v. Sanchez, supra*, the Court, in upholding the validity of the Marihuana Tax Act, 50 Stat. 551, 26 U. S. C., Section 2590(a)(2), said:

"Second. *The tax levied by Sec. 2590(a) (2) is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute. Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. . . .*" (Italics supplied)

It is clear, therefore, that if the taxes imposed by Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Sections 3285, *et seq.*, are, as applied in the District of Columbia, conditioned upon the commission of a Federal crime then they are not true taxes but are penalties in the guise of taxes and unconstitutional. That such is the case, however, is quite clear.

The 10% tax imposed by Title 26, Section 3285, Subchapter A of Chapter 27A of the Internal Revenue Code, applies to certain types of wagers accepted by a person or persons engaged in the business of accepting wagers. Liability for the tax does not arise until the acceptance of such wagers. This is obvious from a reading of Section 3285, *supra*, and Treasury Regulations 132, Sections 325.21, 325.24 and 325.25 which were promulgated to effectuate Section 3285, *supra*, and which state that the 10% tax attaches on the acceptance of a wager. There is no liability under the statute for the 10% tax prior to the acceptance of a wager. But all of the wagering activities as to which the taxes imposed by Chapter 27A of the Internal Revenue Code are applicable are activities which are wholly prohibited by Federal law¹ in the District of Columbia.² In other words a Federal crime must be committed in the District of Columbia before there is any liability for the payment of the 10% tax imposed by Subchapter A of Chapter 27A of the Internal Revenue Code, Section 3285, *supra*. Therefore, it is obvious that this 10% tax is in fact a penalty and is not a true tax as evidence of the commission of a Federal crime in the District of Columbia is essential to its assessment or imposition. Accordingly, Subchapter A of Chapter 27A is unconstitutional as applied in the District of Columbia, and there never was, is, nor will be, under present Federal law, any liability on this defendant or others similarly situate to pay the 10% tax provided for in Subchapter A, *supra*.

It is true that an information was not filed against this defendant for violating the provisions of Sec. 3285, Sub-

¹ *Arnstein v. United States* (1924), 54 Appeals D. C. 199, 296 Fed. 946, cert. denied, 264 U. S. 595; *Storey v. Rives*, (1938) 68 Appeals D. C. 325, 97 F. 2d 182, cert. denied, 305 U. S. 395.

² Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1, Title 22, D. C. Code, Sec. 1501. Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D. C. Code, Sec. 1502. Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864, Title 22, D. C. Code, Sec. 1503. Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22, D. C. Code, Sec. 1508.

chapter A, *supra*. This defendant has been charged with failing to comply with the provision of Section 3290 of Title 26, U. S. C. That section provides as follows:

“SEC. 3290. Tax.

“A special tax of \$50 per year shall be paid by each person *who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.*” (Italics supplied)

A reading of the foregoing section reflects, however, that the liability for the \$50 tax provided for therein is imposed only on those *who are liable for the tax imposed by Subchapter A.*¹ That was the purpose in first discussing the non-applicability of Subchapter A, *supra*. It has been clearly demonstrated hereinbefore that neither this defendant nor other similarly situate in the District of Columbia are liable for the payment of the 10% tax imposed by Subchapter A, *supra*. That being true, it of necessity must follow that there neither was a liability on this defendant to pay the tax provided for by Section 3290, *supra*, nor to register contemporaneously therewith pursuant to the provisions of Section 3291, Title 26, U. S. C. since the latter sections are conditioned on an existing liability for the 10% tax.

The lower appellate court concluded that Section 3290, *supra*, did not impose a penalty in the guise of a tax because it construed *United States v. Kahriger, supra*, to hold that the payment of the \$50 occupational tax and registration must precede the engaging in the business of accepting wagers. It is submitted that the *Kahriger* case, *supra*, does not so hold. But, assuming, *arguendo*, that it does, the only persons who would have to pay the \$50 occupational tax and register before engaging in the business of accepting wagers are those who will be liable in the future for the 10% tax imposed by Subchapter A, *supra*. To conclude

¹ See, also, Treasury Regulation 132, Section 325.41.

otherwise would compel this Court to legislate and read Section 3290, *supra*, as follows:

“SEC. 3290. Tax.

“A special tax of \$50 per year shall be paid by each person ~~who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.~~”

Further, Congress itself has said that Section 3290 is an integral part of subchapter A, *supra*. In its Committee Reports¹ it said:

“The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. * * *”

Therefore, having shown that this defendant neither is, nor will be, liable under existing Federal law for the 10% tax imposed by Subchapter A, *supra*, there was no obligation or duty on him to pay the \$50 tax before engaging in the business of accepting wagers.

A simple example will reflect the accuracy of the foregoing. Contrary to popular belief the 10% tax provided for by Subchapter A, *supra*, does not apply to all types of wagering activities. A person, for example, who runs a poker game or dice table is not by the provisions of Subchapter A, *supra*, liable for the 10% tax. Therefore, he need not pay the \$50 occupational tax and register. How does such a person know this? The only way that any person can determine whether or not he is liable for the 10% tax and, therefore, must pay the \$50 occupational tax, is by looking at the definitions under Subchapter A, *supra*, and determine if the wagering activities he is or will engage in, are subject to the 10% tax. Let us suppose that one person plans to run a dice table and another plans to take wagers on football and

¹ House Report 586, 82d Cong., 1st Sess., page 60. Senate Report 781, 82d Cong., 1st Sess., page 118.

baseball games. Neither has yet engaged in the business of accepting wagers and, therefore, neither is yet liable for the 10% tax. However, assuming that each intends to go into the business of accepting wagers, each must determine whether he must pay the \$50 occupational tax and comply with the registration provisions of Sec. 3291, Title 26, U. S. C. The only way that the two persons can determine whether they must pay the \$50 occupational tax is to look at the provisions of Subchapter A, *supra*, inasmuch as Section 3290, *supra*, (\$50 occupational tax) is, *arguendo*, conditioned on a future liability for the tax imposed by Subchapter A, *supra*. The person who is running a poker game or dice table would observe from the definitions contained in Subchapter A, *supra*, that there will not be any liability for him to pay 10% on wagers accepted by him. Therefore, there is no liability for him to pay the \$50 occupational tax and register. On the other hand, the person accepting football and baseball wagers will observe that he will be liable for the 10% tax. Therefore, he must pay the \$50 occupational tax and register.

All the foregoing is on the assumption that the payment of the occupational tax must precede engaging in the business of accepting wagers, which, it is submitted, the Act clearly does not provide. However, in the District of Columbia, even under such an erroneous premise, this defendant had no obligation to pay the \$50 occupational tax because he neither was nor would be liable for the 10% tax any more than is the person who operates or plans to operate a dice table or a poker table. This is so, because, whereas the one is exempt by virtue of the definitions contained in Subchapter A, *supra*, this defendant is exempt because the 10% tax is unconstitutional in the District of Columbia in that it is conditioned on the commission of a Federal crime and is, therefore, a penalty.

As has been stated heretofore it is submitted that the lower appellate court erred in concluding that the *Kahriger* case, *supra*, stands for the proposition that payment of the \$50 occupational tax must precede engaging in the business

of accepting wagers in the District of Columbia. First, liability for the \$50 tax is by the literal language of Section 3290, *supra*, predicated on an existing liability for the payment of the 10% tax imposed by Subchapter A, *supra*. Second, all such special taxes are due on the first of July or on commencing any trade or business on which such tax is imposed.¹ The \$50 occupational tax is such a special tax. Therefore, the question that must be answered as to when the special \$50 tax must be paid, is, "when has a person commenced the trade or business?" Treasury Regulations 132, Section 325.42, among other things, provides that "commencing business" means the

"... initial acceptance of a wager by a person liable for the 10% excise tax ...".

Therefore, no person can be held to have commenced the business of accepting wagers until he has accepted his initial wager. Accordingly, the \$50 special tax provided by Section 3290, *supra*, is not owing and due until he has accepted his initial wager. Therefore, Section 3290, *supra*, is of itself conditioned on the commission of a Federal crime in the District of Columbia and is, accordingly, a penalty in the guise of a tax and is unconstitutional.

Third, the language in the *Kahriger* case, *supra*, relied upon by the lower appellate court (R-43) "... he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions . . ." does not support the proposition that payment of the \$50 occupational tax is a condition precedent. All that the Supreme Court was considering was the application of those taxes in the states and all that it meant by this language was that if persons *in the states* complied with the conditions set forth in the Wagering Tax Act, the Federal Government would not interfere by penal proceedings with such activities.

¹ Section 3271, Title 26, U. S. C.

The accuracy of the foregoing statement is evidenced in many ways. First of all, the Supreme Court stated in the *Kahriger* case, *supra*, at page 512:

* * * "The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers *regardless of whether such activity violates state law.* * * *" (Italics supplied)

Secondly, it cited the License Tax Cases, 5 Wall. 462, 471, and quoted therefrom as follows:

"* * * Congress cannot authorize a trade or business within a state in order to tax it. If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.

"But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. *They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid.* The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. *The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.* * * *" (Italics supplied)

Also, the cases cited in the footnote by the Supreme Court at page 516 of the *Kahriger* opinion, were cases wherein certain conditions must be fulfilled *in order to be permitted to engage in the business.* But the situation is to the contrary in the instant case. The Wagering Tax Act itself, by Section 3297, specifically provides that the payment of any of the taxes imposed by the Act shall not exempt the taxpayer from any penalties provided by Federal law. Accordingly, fulfillment of the conditions

does not give any license or permission to engage in the activity in the District of Columbia. All of the cases relied upon by the United States in its briefs and the Supreme Court in its Opinion in the *Kahriger* case (pages 512-515) were cases construing statutes imposing taxes upon activities which had not been made illegal under Federal law. Consequently, such taxes were held to be true taxes and not penalties in the guise of taxes as they were not conditioned on the commission of a crime. The taxes imposed by the Wagering Tax Act, however, are not taxes but are penalties as applied in the District of Columbia in that they are conditioned on the commission of a Federal crime.

In concluding, the Court's attention is directed to page 6 of the brief filed by the United States in the *Kahriger* case, *supra*, wherein it stated:

"A federal tax is not invalid because levied on an occupation unlawful *under state law*. . . ." (Italics supplied)

Again at page 12 of its brief the United States said:

". . . Since the License Tax Cases there has been no doubt that Federal taxes may be imposed on occupations forbidden *by state law*. . . ." (Italics supplied)

Again at page 25, the United States said:

"The instant tax on wagers and the registration provisions attendant thereon apply irrespective of the legality of gambling *under state law*. . . ." (Italics supplied)

Both the United States and the Supreme Court considered the application of these taxes only as applied to occupations, whether legal or illegal, *under state law*. In fact, the sole "question presented" as set forth in the brief of the United States in the *Kahriger* case, *supra*, page 2 thereof, is as follows:

“Whether the occupational tax provisions of the Revenue Act of 1951 (26 U. S. C., Supp. V, 3290) which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the Collector of Internal Revenue, are unconstitutional because incidental regulatory features of the registration section (26 U. S. C., Supp. V, 3291) *infringe the police power reserved to the states.*” (Italics supplied)

The question presented in the instant case, namely the invalidity of these taxes as applied to activities all of which have been made illegal in the District of Columbia by Federal law, was never passed on nor considered.

- B. The provisions of Chapter 27A of the Internal Revenue Code, Title 26, U. S. C., Sections 3285, et seq., contravene the Fifth Amendment of the United States Constitution because the information called for would incriminate or tend to incriminate this defendant of violations of Federal law in the District of Columbia.**

No citation of authority is necessary in support of the principle that it is beyond the power of the Congress of the United States to penalize the failure of a person to give a statement which is self-incriminatory under Federal law. Therefore, it is submitted that if the provisions of Chapter 27A, *supra*, require the furnishing of information which is self-incriminatory or which would tend to incriminate under Federal law in the District of Columbia, such provisions are unconstitutional as they contravene the provisions of the Fifth Amendment of the Constitution. It is submitted that the provisions of Chapter 27A require the furnishing of such incriminatory information and penalize the failure to furnish the same and, accordingly, are unconstitutional as they contravene the provisions of the Fifth Amendment of the Constitution.

Section 3285, *supra*, Subchapter A of Chapter 27A, *supra*, which imposes the 10% tax on certain types of wagers and which has been discussed heretofore, requires that

this tax shall be paid on all such wagers. The Internal Revenue Service has prepared a return, Form 730, Treasury Department, Internal Revenue Service, which must be filed with a remittance covering the tax due under Section 3285, *supra*, for any calendar year month, and which must be in the hands of the Collector of Internal Revenue for the district in which the office or principal place of business of the taxpayer is located on or before the last day of the succeeding month. Among other things Form 730 which is headed "Tax on Wagering" calls for the gross amount of wagers accepted during the month, gross amount of lay off wagers accepted during the month, the net tax due, etc. Obviously, the information which is required by Form 730 and which must be furnished at the time the 10% tax is paid would incriminate or tend to incriminate this defendant of a violation or violations of Federal law in the District of Columbia. The information set forth on Form 730 and the payment of the tax due would constitute an admission by this defendant, or others similarly situate, of the commission of Federal crimes in the District of Columbia committed during the preceding month.

Most apropos is a footnote which appears in the very recent case decided by the Supreme Court on December 7, 1953, namely, *United States v. Five Gambling Devices, et al.*, 74 S. Ct. 190, 196, wherein Justices Black and Douglas of the majority stated:

"Holding that the Act requires reports of interstate sales would raise a serious constitutional question. The Act makes it a crime to transport gambling devices in interstate commerce. Consequently, requiring monthly reports of sales and deliveries made by an interstate dealer would require him to make monthly reports of his own crimes. The Fifth Amendment provides that no person shall be compelled 'to be a witness against himself.' "

The identical situation is presented in the instant case. Accordingly, the provisions of Subchapter A of Chapter

27A of the Internal Revenue Code, Section 3285, *supra*, contravene the provisions of the Fifth Amendment when applied in the District of Columbia in that compliance with its provisions would incriminate or tend to incriminate the defendant and others similarly situate in the District of Columbia of the commission of criminal acts in violation of Federal law. Accordingly, Subchapter A, *supra*, is unconstitutional and invalid.

But, as has been previously pointed out, the necessity of complying with the provisions of Section 3290, *supra*, the \$50 tax section, and Section 3291, *supra*, the registration section, are conditioned on a liability for the payment of the 10% tax imposed by Subchapter A, *supra*.¹ Since neither this defendant nor others similarly situate in the District of Columbia could be required to comply with the provisions of Subchapter A, *supra*, in that compliance therewith would incriminate or tend to incriminate of a violation of Federal law in the District of Columbia, there was no duty or obligation on this defendant to comply with the provisions of Sections 3290, *supra*, and 3291, *supra*.

Further, as has been previously shown, since the \$50 tax section, Section 3290, *supra*, and registration section, Section 3291, *supra*, are completely dependent upon the validity of Subchapter A, the 10% section, the obligation to pay the \$50 tax and register contemporaneously therewith does not arise until an initial wager has been accepted. Accordingly, the payment of the \$50 Tax and the filing of the registration statement, Section 3291, *supra*, furnishing therein the information called for would incriminate or tend to incriminate this defendant of crimes in the District of Columbia, namely, that he had violated the Federal anti-gambling laws, and, therefore, these sections are unconstitutional in that they themselves contravene the provisions of the Fifth Amendment.²

¹ See, also, Treasury Regulation 132, Section 325.41.

² Treas. Decision 4929, Sec. 463 C. 32. Treas. Decision 4929, Sec. 463 C. 33. Treas. Decision 4929, Sec. 463 C. 34. Treas. Decision 5138, Sec. 458-611.

Even assuming, *arguendo*, that registration and payment of the \$50 occupational tax must precede the acceptance of a wager, such an argument could be advanced only if Subchapter A, *supra*, is constitutional and the 10% tax section is valid. But as has been previously shown, the 10% tax section is invalid and unconstitutional in that compliance therewith will incriminate or tend to incriminate in violation of Federal law in the District of Columbia. Therefore, even under this erroneous assumption, there was no obligation nor requirement for this defendant to comply with the provisions of Section 3290, *supra*, the \$50 tax section, and Section 3291, *supra*, the registration section.

Again, assuming, *arguendo*, that registration and payment of the \$50 occupational tax must precede the acceptance of a wager and assuming, *arguendo*, that Subchapter A, *supra*, the 10% tax section, is constitutional, it is submitted that this defendant was not required to comply with the provision of Section 3290, the \$50 tax section, nor Section 3291, the registration section. This is so because an agreement to engage in the kind of gambling activities which are covered by the provisions of the Wagering Tax Act would be an illegal agreement under Federal laws in the District of Columbia. Therefore, the payment of the \$50 tax and the filing of the registration form on the part of one or more co-conspirators in order to obtain a special tax stamp would constitute an overt act in furtherance of the illegal agreement and this defendant would thereby subject himself to prosecution for a violation of Title 18, U. S. C., Section 371.

The lower appellate court in ruling against the contention that the provisions of the Wagering Tax Act are unconstitutional in that they contravene the Fifth Amendment, relied on language appearing in the opinion of the *Kahriger* case, *supra*, at page 515 thereof, wherein the Supreme Court discussed *United States v. Sullivan*, *supra*, and quoted therefrom. The quote, however, was relied on only in an application of the Wagering Tax Act *in the states*. Therefore, it is submitted, that there is a vast dis-

inction between the situation in the *Kahriger* case, *supra*, and the present case. In this regard the Court's attention should first be directed to certain statements which appeared in the reply brief filed by the United States in the *Kahriger* case, *supra*, which will lay a foundation for a clear showing of the distinction to be drawn. At page 2 of its reply brief it stated:

"We submit that the registration requirements of Sec. 3291 clearly do not violate the Fifth Amendment. In the first place, the *occupation taxed is unlawful only under state laws*, and the federal privilege against self-incrimination protects only against inquiries incriminatory under federal law. . . ." (Italics supplied)

Again, at page 3 of its reply brief the United States stated:

"Section 3290 imposes a tax on the occupation of wagering. *Wagering is doubtless unlawful* in many states (perhaps in all but Nevada), but *it is not forbidden by any federal law.*"

"Thus *the registration statement* in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals *does not call for a disclosure of information which will reveal a violation of federal law.*

"It is established that the self-incrimination clause of the Fifth Amendment only relates to information incriminatory under federal law. . . ." (Italics supplied)

The foregoing excerpts from the reply brief of the United States clearly show why the Supreme Court in the *Kahriger* case at page 515 stated:

"Nor do we find the registration requirements of the Wagering Tax Act offensive. All that is required is the filing of names, addresses and places of business. This is quite general in tax returns . . .".

If the Act is applied only *in the states*, the above-quoted language is correct for under the decided cases there is nothing offensive in the registration requirements when viewed solely from a state aspect. That is so, because, as the United States had pointed out in its reply brief, wagering is not forbidden by any Federal law *in the states*. But the situation is completely to the contrary in the District of Columbia. All of the gambling activities embraced by the Wagering Tax Act have, prior to its enactment, been made Federal crimes in the District of Columbia and on their face the registration forms and tax returns call for information which would incriminate or tend to incriminate this defendant of a violation of a Federal law in the District of Columbia. Further, in those instances in which the Supreme Court has upheld the validity of Acts of Congress calling for information to be given by the taxpayer,¹ the activity taxed had not been made a Federal crime by the Congress of the United States and, accordingly, the information called for would not incriminate or tend to incriminate the individual of a violation of Federal law if said information was furnished. It was against this background that the Supreme Court relied on the case of *United States v. Sullivan*, *supra*. The *Sullivan* case involved the failure of a bootlegger to file an income tax return during the prohibition era. His defense was that the return called for information which would incriminate or tend to incriminate him of a violation of Federal law, to wit, the National Prohibition Act. The Supreme Court rejected this argument and stated in substance that the income tax return did not on its face call for any information which would incriminate or tend to incriminate him, but, that if there was some answer which would tend to incriminate him, then it was at that time that the defendant had the privilege of raising the protection afforded him by the Fifth Amendment but he could not refuse to file any

¹ *United States v. Kahriger*, *supra*, Pgs. 511-515.

return at all. The most pertinent language in the *Sullivan* case is that at page 263 wherein the court stated:

“... most of the items warranted no complaint ...”

Obviously, this was a correct statement for the giving of name, address, place of business, etc., certainly is not incriminatory on its face. It might be said that “source” of income would call for information which might incriminate or tend to incriminate in violation of Federal law if the taxpayer was engaged in an activity made illegal under Federal law. Under the authority of the *Sullivan* case, at the time of filing the income tax return he could have refused to answer those questions which reasonably might tend to incriminate. *In the instant case, however, all of the items warrant complaint* and all are incriminatory on their face. The very registration form itself, Form 11-C, is headed “Special Tax Return and Application for Registry—Wagering”.¹ Form 730 which must be filed each month, together with a check for 10% of the amount of wagers accepted, is headed “Tax on Wagering” and calls for the gross amount of wagers, amount of tax due, etc.² It is submitted, that a mere cursory look at the registration form and monthly tax return, discloses that furnishing the information required would certainly have brought this taxpayer into danger of prosecution and punishment for violations of Federal law in the District of Columbia. Accordingly, it is submitted that the provisions of Chapter 27A of the Internal Revenue Code, Section 3285, *supra*, as applied to this defendant in the District of Columbia contravene the privilege against self-incrimination as guaranteed by the Fifth Amendment of the Constitution.

Further, the filing of the registration form and/or the monthly returns as required by the Wagering Tax Act would constitute a waiver of the privilege against self-incrimination. In order to avail one's self of the privilege

¹ Treas. Regs. 132, Secs. 325.50, 325.51, 325.52.

² Treas. Regs. 132, Secs. 325.30, 325.31, 325.32.

against self-incrimination a person must invoke the privilege at the first apprehension of danger, that is at the first moment when information is called for which if given by him would incriminate or tend to incriminate him of a violation of Federal law. In the case of *United States v. St. Pierre*,¹ the court said:

“The time for a witness to protect himself is when the decision is first presented to him;” . . . ,

The time when the decision is first presented to him differs according to the circumstances. As the court stated in *United States v. Pechart*:²

“... It is conceded in the record that the defendants were men engaged in gambling and other related so-called racketeering activities. Because of that fact, are they to be deprived of the right to exercise their constitutional privileges?

“Preliminarily to a decision on the fact, I think it may be pertinent and appropriate to state that if the constitutional privilege becomes unavailing to a person because of his occupation, it is but a short step to make it unavailing to a man because he is a Republican or Democrat, or a Catholic or a Jew. The privilege is one that is exercisable by any person provided that the facts and circumstances warrant its exercise.” * * *

“Furthermore, the case is not precedentially of any value to us *because the matter of the exercise of privilege may be different in given circumstances, at a different time, and in a different Forum and where different issues are present.* Every case where the exercise of the privilege against self-incrimination is sought to be availed of must be determined with respect to the facts and circumstances of that particular case.”

Where the questions call for answers incriminatory on their face there is no burden on the witness to show special

¹ *United States v. St. Pierre*, 132 F. 2d 837, writ dismissed, 63 Sup. Ct. 910, 319 U. S. 41.

² *United States v. Pechart*, 103 F. Supp. 417, 419.

circumstances why the answers called for would be incriminatory.¹ Where they are not incriminatory on their face, the defendant must show some tangible and substantial probability that his answers to such questions would tend to incriminate him. It is then for the court to finally determine whether incrimination is reasonably possible from any answer the witness may give, but, if such possibility exists the privilege bars compulsory disclosure of any fact that would tend to incriminate him.²

It is submitted that this witness properly exercised his privilege against self-incrimination by remaining silent and refusing to furnish the required information because the questions call for answers which on their face incriminate or tend to incriminate in the District of Columbia.

In *Blau v. United States*, 340 U. S. 159, at page 160, 71 Sup. Ct. 223, 224, the Supreme Court stated:

“Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, *the Constitution gives a witness the privilege of remaining silent.*” (Italics supplied)

All that is required in invoking the privilege against self-incrimination is that the answer might tend to incriminate or might furnish a link in the chain of evidence which might ultimately incriminate.³ If a witness having the right to invoke the privilege under such circumstances fails

¹ *United States v. Raley*, 26 F. Supp. 495, 496 (D. C. 1951).

² *Estes v. Potter*, 183 F. 2d 865, 868, Cert. Denied 81 S. Ct. 356, 340 U. S. 920.

³ *United States v. Burr*, 25 Fed. Cases, pages 38, 40, No. 14,692c. *Hoffman v. United States*, 71 S. Ct. 814, 818. *Blau v. United States*, 340 U. S. 159.

to so do and furnishes the information called for, such person waives the privilege.¹

In concluding, it is submitted that there was no other way in which this defendant could successfully exercise the privilege against self-incrimination other than refusing to furnish the required information. *Combs v. Snyder*, D. C. D. C. 101 F. Supp. 531, affirmed without opinion, 342 U. S. 132, stands for the proposition that all the information called for must be furnished in order to obtain a special tax stamp. It would be ridiculous to advance the premise that this defendant should have gone to the Internal Revenue Service and stated to the officers therein that he wanted a special tax stamp but he was not going to furnish the information called for as that would incriminate or tend to incriminate him of a violation of Federal law in the District of Columbia and, accordingly, invoked the privilege accorded by the Fifth Amendment. Such an act on his part would have exposed him immediately to prosecution or most certainly would have furnished a link or lead whereby he could ultimately have been prosecuted and perhaps convicted.

It is asserted that if this defendant had filed the required returns, the same could subsequently have been introduced by the United States in a criminal proceeding. Under these circumstances, it is asserted that at trial when the returns were offered in evidence the United States would unquestionably advance the argument that this defendant had waived the privilege afforded by the Fifth Amendment by furnishing the required information. But even though such returns were ruled to be inadmissible in a criminal proceeding against this defendant, such a ruling could not deprive him of his right to invoke the privilege against self-incrimination. In such a situation the facts would parallel those in the case of *Counselman v. Hitchcock*, 142

¹ *Rogers v. United States*, 71 S. Ct. 438. *United States ex Rel. Vajtauer v. Commissioner*, 47 S. Ct. 302, 273 U. S. 103. *United States v. Murdock*, 281 U. S. 141. *United States v. Monia*, 317 U. S. 424.

U. S. 547. As the court pointed out in that case at page 564-565:

"It remains to consider whether § 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows, that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. . . . The protection of § 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. . . . *Neither could the ruling of a court excluding the admission of the returns be sufficient protection. . . .*" (Italics supplied)

Unquestionably the information obtained from the returns would furnish leads or links in the chain of evidence which would have tended to incriminate this defendant.

The privilege afforded by the Fifth Amendment is predicated on "compulsion" being present. The Wagering Tax Act has such compulsion therein and, accordingly, the privi-

lege has been properly exercised by this defendant. The compulsion present in the Wagering Tax Act is the existence of the likelihood of punishment for failure to comply with the provisions of said Act. The punishment for such failure is provided for in Section 3294 of the Act and in the instant case the United States is seeking to impose that punishment on this defendant for failing to pay the \$50 tax and furnish the required information. Punishment is the key concept of compulsion. It is indispensable to the existence of the privilege against self-incrimination. Again and again in describing the privilege the courts have pointed out such expression as "protection (to the witness) against being brought by means of his evidence within the penalties of the law." *Mason v. United States*, 344 U. S. 365, 366, or "he might be convicted when otherwise and if he had refused to answer he could not have possibly been convicted." *Counselman v. Hitchcock*, *supra*; *Brown v. Walker*, 161 U. S. 591. Again in the trial of *Aaron Burr*, *supra*, Chief Justice Marshall stated:

"... It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of the crime *which is punishable by the laws*" . . . (Italics supplied)

The Wagering Tax Act by its provisions calls for certain steps to be taken, namely, the filing of certain returns giving certain information. This defendant asserts that furnishing such information would incriminate or tend to incriminate him of violations of Federal law in the District of Columbia. By failing to furnish the required information he has subjected himself to the penalties provided by Section 3294 of the Act unless the protection of the Fifth Amendment was properly available to him. It is asserted that the privilege has been properly exercised. It should not be forgotten that there is no immunity statute which would protect this defendant if he had complied with the provisions of the Wagering Tax Act. In fact, Sec. 3297, *supra*, provides to the contrary.

An excellent review of the cases *re* the exercise of the privilege is contained in the case of *Aiuppa v. United States*, 201 F. 2d 287, 300 (Sixth Circuit Court of Appeals, 1952). Cited with approval in *U. S. v. Doto*, 205 F. 2d 416, 418 (2nd Cir. 1943). In concluding that opinion the court used language which is most pertinent to the present situation. At page 300 of that opinion the court stated:

"Despite the enjoyment by millions of spectators and auditors of the exhibition by television of the confusion and writhings of widely known malefactors and criminals, when sharply questioned as to their nefarious activities, we are unable to give judicial sanction, in the teeth of the Fifth Amendment, to the employment by a committee of the United States Senate of methods of examination of witnesses constituting a triple threat: answer truly and you have given evidence leading to your conviction for a violation of federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment. In our humble judgment, to place a person not even on trial for a specified crime in such predicament is not only not a manifestation of fair play, but is in direct violation of the Fifth Amendment to our national Constitution."

The same triple threat is present in the instant case. If this defendant had filed the required returns and answered truly he would have given evidence leading to his conviction for violation of Federal law. If he had filed the returns and answered falsely, he would have been convicted of perjury. Having refused to answer he is now being prosecuted for failing to have answered.

In concluding this portion of the argument it is submitted that where information is sought which if given would incriminate or tend to incriminate an individual of a violation of Federal law, that individual can properly invoke the protection of the Fifth Amendment at the first moment that he apprehends danger. The protection of the privilege is not removed unless (a) he waives the privilege by

giving the information required, or (b) a complete immunity statute cancels the privilege because it removes the punishment to which he might be subjected by virtue of giving the required information, or (c) the furnishing of the required information while contrary to a law of the United States would not subject the person to any penalty or punishment. However, as long as there is a possibility of punishment which may ensue by furnishing the required information, and none of the foregoing exceptions are present, the protection of the Fifth Amendment can be invoked. This defendant has properly relied on the protection afforded by the Fifth Amendment.

C. The provisions of Chapter 27A of the Internal Revenue Code, specifically Sections 3275 and 3293, contravene the provisions of the Fourth Amendment of the United States Constitution.

It is well settled that probable cause for issuing a search warrant is less than proof of guilt.¹

As was stated in the *Dumbra* case:

“Probable cause for issuing a search warrant is shown if ‘the affiant had reasonable grounds of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged’ (*Dumbra v. United States, supra*, at 441). ‘Probable cause has been defined by this Court as “reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.”’ (*ibid.*).”

Compliance with the provisions of Chapter 27A, *supra*, would result in a posting by the Collector of Internal Reve-

¹ *Dumbra v. United States*, 268 U. S. 435; *Steele v. United States*, No. 1, 267 U. S. 498; cf. *Brinegar v. United States*, 338 U. S. 160; *Carroll v. United States*, 267 U. S. 132.

nue pursuant to the provisions of Section 3275, Title 26, U. S. C. This section would require the Collector to post in a conspicuous place in his office, for public inspection, the name of this defendant and the time, place and business for which the special tax was paid. This would immediately put the United States Attorney for the District of Columbia on notice that this defendant was engaged in activities in violation of Federal law in this District, and he could immediately obtain the returns filed and use them in a prosecution against this defendant or at least obtain leads from them whereby he could prosecute him.¹ Further, Section 3293, Title 26, U. S. C. would require this defendant to post the special tax stamp in his place of business under penalty of Federal law if he fails so to do.² The contravention of the Fourth Amendment is made quite apparent by this section for the very business for which the special tax stamp is issued and required to be posted is unlawful in the District of Columbia.³ Since compliance with either or both of the foregoing sections would lay a predicate for the issuance of a search warrant, this compulsion constitutes a device to obtain information under the guise of statutory authority so that thereafter the United States could assert "probable cause" for the issuance of a search warrant and subsequently contend that any search or seizure pursuant thereto was valid.

¹ Treas. Dec. 4929, Secs. 463 C. 32, 463 C. 33, 463 C. 34; Treasury Dec. 5138, Sec. 458.611.

² Treasury Regs. 132, Section 325.53.

³ *United States v. Yuginovich*, *supra*, page 464.

CONCLUSION.

It is respectfully submitted that the judgment of the Municipal Court of Appeals for the District of Columbia should be reversed.

WALTER E. GALLAGHER,
821 Fifteenth Street, N. W.,
Washington 5, D. C.,

MYRON G. EHRLICH,
Columbian Building,
Washington, D. C.,

Counsel for Appellant.

January, 1954.

STATUTES AND REGULATIONS INVOLVED

**Act of October 20, 1951, c. 521, Title IV, § 471 (a), 65 Stat. 529.
Title 26 U.S.C. §§ 3285 et seq., Chap. 27A Internal Revenue
Code. (Wagering Tax Act)**

“CHAPTER 27A—WAGERING TAXES**“SUBCHAPTER A—TAX ON WAGERS****“SEC. 3285. Tax.**

“(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

“(b) Definitions. For the purposes of this chapter—

“(1) The term ‘wager’ means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

“(2) The term ‘lottery’ includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

“(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

“(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and

shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

“(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

“(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

“SEC. 3286. Credits and Refunds.

“(a) No overpayment of tax under this subchapter shall be credited or refunded (otherwise than under subsection (b)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Secretary, (1) that he has not collected (whether as a separate charge or otherwise) the amount of the tax from the person who placed the wager on which the tax was imposed, or (2) that he has repaid the amount of the tax to the person who placed such wager, or unless he files with the Secretary written consent of the person who placed such wager to the allowance of the credit or the making of the refund. In the case of any laid-off wager, no overpayment of tax under this subchapter shall be so credited or refunded to the person with whom such laid-off wager was placed unless he establishes, in accordance with regulations prescribed by the Secretary, that the provisions of the preceding sentence have been complied with both with respect to the person who placed the laid-off wager with him and with respect to the person who placed the original wager.

“(b) Where any taxpayer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit against the tax imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount. Such credit or refund shall be in an amount which bears the same ratio to the amount of tax which such taxpayer paid under this subchapter on the original wager as the amount so laid off bears to the amount of the original wager. Credit or refund under this subsection shall be allowed or made only in accordance with regulations prescribed by the Secretary; and no interest shall be allowed with respect to any amount so credited or refunded.

“SEC. 3287. Certain provisions made applicable.

“All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable.

“Subchapter B—Occupational Tax

“SEC. 3290. Tax.

“A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

“SEC. 3291. Registration.

“(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

“(1) his name and place of residence;

“(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

“(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

“(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

“(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

“SEC. 3292. Certain provisions made applicable.

“Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply.

“SEC. 3293. Posting.

“Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue.

“SEC. 3294. Penalties.

“(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000.

“(b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section 3293, shall

be liable to a penalty of \$50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of \$100, and the cost of prosecution.

“(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

“Subchapter C—Miscellaneous Provisions

“SEC. 3297. Applicability of Federal and State Laws.

“The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

“SEC. 3298. Inspection of Books.

“Notwithstanding section 3631, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.”

(b) Technical amendment. Section 3310(f) (relating to discretion allowed the Commissioner with respect to returns and payment of tax)⁵³ is hereby amended by inserting after “subchapter A of chapter 25,” the following: “subchapter A of chapter 27A,”.

SEC. 472. EFFECTIVE DATE OF PART VII.

The tax imposed by subchapter A of chapter 27A, as added by section 471, shall apply only with respect to wagers placed on or after the first day of the first month which begins more than 10 days after the date of enactment of this Act. No tax shall be payable under subchapter B of chapter 27A, as added by section 471, with respect to any period prior to the first day of the first month which begins more than 10 days after the date of enactment of this Act. In the case of any person who is liable for tax under subchapter A of chapter 27A, as added by section

⁵³ U.S.C.A. § 3310(f).

471, or who is engaged in receiving wagers for or on behalf of any person so liable, and who commenced the activity which makes him subject to such tax, or who was engaged in receiving such wagers, prior to the first day of the first month specified in the preceding sentence, the tax under subchapter B of chapter 27A, as added by section 471, shall be reckoned proportionately from the first day of such month to and including the thirtieth day of June following and shall be due on, and payable on or before, the last day of the month specified in the preceding sentence."

Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1, Title 22, D.C. Code, Sec. 1501:

**LOTTERIES—PROMOTION—SALE OR POSSESSION
OF TICKETS.**

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

**Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22.
D. C. Code, Sec. 1502:**

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than \$500 or be imprisoned for not more than six months, or both.

**Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864, Title 22.
D. C. Code, Sec. 1503.**

If any person shall knowingly permit, on any premises under his control in the District, the sale of any chance or ticket in or share of a ticket in any lottery or policy lottery, or shall knowingly permit any lottery or policy lottery, or policy shop on such premises, he shall be fined not less than fifty dollars nor more than five hundred dollars, or be imprisoned not more than one year, or both.

Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22, D. C. Code, Sec. 1508.

It shall be unlawful for any person or association of persons to bet, gamble, or make books or pools on the result of any trotting or running race of horses, or boat race, or race of any kind, or on any election, or any contest of any kind, or game of baseball. Any person or association of persons violating the provisions of this section shall be fined not exceeding five hundred dollars or be imprisoned not more than ninety days, or both.

Constitution of the United States

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

“ * * * nor shall be compelled in any criminal case to be a witness against himself * * * .”

Act of June 25, 1948, c. 645, 62 Stat. 701, U.S.C. Title 18, § 371.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

53 Stat. 395, Title 26, U. S. C. § 3275

§ 3275. List of special taxpayers for public inspection.

(a) In collector's office. Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of \$1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged.

53 Stat. 394, Title 26, U. S. C. § 3271.

§ 3271. Payment of Tax.

(a) Condition precedent to doing business. No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

Treasury Regulations 132, relating to excise and special tax on wagering under Chapter 27A of the Internal Revenue Code (Part 325 of Title 26), Codification of Federal Regulations, and as amended July 16, 1952.

“SEC. 325.21. Scope of tax . . .

“(b) *A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.*” (Emphasis supplied)

“SEC. 325.24. Person liable for tax. (a) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax on any such wager accepted by him. Every person who operates a wagering pool or lottery conducted for profit is liable for the tax with respect to any wager or contribution placed in such pool or lottery. To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers or operating a wagering pool or lottery physically receive the wager or contribution. Any wager or contribution received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person.

“(b) If a person engaged in the business of accepting wagers or conducting a lottery or betting pool for profit lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers or conducting a betting pool or lottery for profit, he shall, notwithstanding such lay-off, be liable for the tax on the wagers or contributions initially accepted by him. See section 325.34 for the credit and refund provisions applicable with respect to laid-off wagers.”

**Treas. Regs. 132, Section 325.25(a), "When tax attaches"
reads as follows:**

"SEC. 325.25. When tax attaches.

"(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor*. In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor." (Emphasis supplied)

Treasury Reg. 132, Sec. 325.30. Returns.

(a) Every person required to pay the tax on wagers imposed by section 3285 of the Code shall prepare each month from the daily records required by section 325.32 a return, in duplicate, on Form 730 in accordance with the instructions thereon. The original return, together with the amount of the tax, shall be filed with the collector of internal revenue for the district in which is located the office or principal place of business of the person required to make the return. If such person resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If such person has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector at Baltimore, Maryland. The return shall be filed on or before the last day of the month following that for which it is made.

(b) When the last day of the month in which a return and payment are due falls on Sunday or a legal holiday, the return may be filed and payment made on the next secular or business day. A return shall be forwarded to the collector for each month whether or not any liability has been incurred for that month. If a taxpayer ceases operations which make him liable for tax, the last return shall be marked "Final Return".

Treasury Reg. 132, Sec. 325.31. Payment of Taxes.

All taxes are due and payable to the collector of internal revenue, without assessment by the Commissioner or notice

from the collector, at the time fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 percent per annum from the time the tax became due to the actual date of payment or assessment, whichever is earlier. For provisions with respect to interest generally, including interest on assessments, see section 325.36.

Treasury Reg. 132, Sec. 325.32. Records.

(a) In general. (1) Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, at his office or principal place of business, or, if he has no office or principal place of business, at his residence or some other convenient or safe location, such records as will clearly show as to each day's operation:

(A) The gross amount of all wagers accepted;

(B) The gross amount of each class or type of wager accepted on each separate event, contest, or other wagering medium. For example, in the case of wagers accepted on a horse race, the daily record shall show separately the gross amount of each class or type of wagers (straight bets, parlays, "if" bets, etc.) accepted on each horse in the race. Similarly, in the case of the numbers game, the daily record shall show the gross amount of each class or type of wagers accepted on each number;

(C) Separately, the gross amount of wagers—

(i) accepted directly by the taxpayer or at any registered place of business of the taxpayer (other than laid-off wagers),

(ii) accepted for his account by agents at any place other than a registered place of business of the taxpayer (other than laid-off wagers), and

(iii) accepted as laid-off wagers from persons subject to the excise tax;

(D) With respect to wagers laid off with others, the name, address, and registration number of each person with whom the laid-off wagers were placed, and the gross amount laid off with each such person, showing separately the gross amount of laid-off wagers with respect to each

event, contest, or other wagering medium. For example, the daily record shall show the gross amount laid off on each horse in a race; and

(E) The gross amount of tax collected from or charged to bettors as a separate item.

(2) If a taxpayer has any agents or employees receiving wagers on his behalf, he shall maintain a separate record showing the name and address of each agent or employee, the period of employment, and the number of the special tax stamp issued to each such agent or employee.

(3) A duplicate copy of each return required by section 325.30 shall be retained as part of the taxpayer's records.

(b) Period for retaining records. The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the tax became due.

"SEC. 325.40. Effective date of tax. The special tax imposed by section 3290 of the Internal Revenue Code is effective on and after November 1, 1951.

"SEC. 325.41. Persons liable for tax. Every person who is liable for the 10 percent excise tax imposed on wagers by section 3285 of the Internal Revenue Code and every person who is engaged in receiving wagers for or on behalf of any other person so liable is liable for the special tax.

Example (1). A is engaged in the business of accepting horse race bets. He employs ten persons to receive on his behalf wagers which are transmitted by telephone. He also employs a secretary and bookkeeper.

A and each of the ten persons who receive wagers by telephone are liable for the special tax. The secretary and bookkeeper are not liable unless they also receive wagers for A.

Example (2). B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

B, his ten agents, and the employee who collects the wagers received on his behalf are each liable for the special tax.

SEC. 325.42. Rate and computation of tax. (a) A tax of \$50 per year is imposed upon each person liable for the tax. A person engaged both in accepting wagers on his own account and in receiving wagers for or on behalf of some other person is required to purchase but one special tax stamp.

(b) The tax year begins July 1 and ends June 30. Persons commencing business between August 1 and June 30 (both dates inclusive) shall pay a proportionate part of the annual tax. "Commencing business" means the initial acceptance of a wager by a person liable for the 10 percent excise tax or the initial receiving of a wager by an agent or employee for or on behalf of some other person. Persons in business for only a portion of a month are liable for tax for the full month, i.e., a person first becoming subject to the special tax on, for example, the 20th day of a month, is liable for tax for the entire month. As the tax became effective on November 1, 1951, persons in business on that date or commencing business during that month are liable for the tax for the eight months of the year ending the following June 30.

SEC. 325.50. Registry, return, and payment of tax. (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24 of these regulations) and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Balti-

more, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein.

(b) Every person engaged on November 1, 1951, in any business which makes him subject to the special tax, or first engaging in such business during the month of November 1951, shall register and file a return on Form 11-C and pay the tax on or before November 30, 1951. Thereafter, such person shall register, file a return, and pay the tax on or before the last day of July of each year.

(c) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. In the case of a corporation, the true name and title of each officer and his place of residence shall be shown.

(d) Each person engaged in the business of accepting wagers on his own account shall furnish the name and address of each place where such business is conducted, together with the true name and residence address of each agent or employee accepting wagers on his behalf. Each agent or employee of a person accepting wagers shall furnish the name and residence address of each person (i.e., individual, partnership, corporation, etc.) on whose behalf such wagers are accepted.

SEC. 325.51. Records of agent or employee. Every person who is engaged in receiving wagers of a type described in section 325.21 for or on behalf of another person (at any place other than a registered place of business of such other person), shall keep a record showing for each day (1) the gross amount of such wagers received by him, (2) the amount, if any, retained as a commission or as compensation for receiving such wagers, and (3) the amount turned over to the person on whose behalf the wagers were received, and the name and address of such person. The records required by this section shall, at all times, be open for inspection by internal revenue

officers, and they shall be maintained for a period of at least four years from the date the wager was received.

“SEC. 325.52. Tax payment evidenced by special tax stamp. (a) Upon receipt of a return, on Form 11-C, together with remittance of the full amount of tax due, the collector will issue a special tax stamp as evidence of payment of the special tax. Such payment shall be made only in the form of cash, certified check, cashier's check, or money order.

(b) Collectors will distinctly write or print on the stamp before it is delivered or mailed to the taxpayer the following information: (1) the taxpayer's registered name, and (2) the business or office address of the taxpayer if he has one; if not, the residence address. Special tax stamps will be transmitted by ordinary mail, unless it is requested that they be transmitted by registered mail, in which case additional cost to cover registry fee shall be remitted with the return.

(c) Collectors and their deputies are forbidden to issue receipts in lieu of stamps representing the payment of special taxes.”

SEC. 325.53. Special tax stamp to be posted. The special tax stamp issued to a taxpayer as evidence of the payment of the tax shall be kept posted conspicuously in his principal place of business, except that if he has no such place of business he shall keep such stamp on his person and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue. Any person who, through negligence, fails to post the special tax stamp in his principal place of business, or who fails to keep the special tax stamp on his person in the event he has no business address, shall be liable to a penalty of \$50 and the cost of prosecution. If through willful neglect or refusal, any person fails to comply with the provisions of section 3293, he shall be liable to a penalty of \$100 and the cost of prosecution.

SEC. 325.54. Certificates in lieu of stamps lost or destroyed. When a special tax stamp has been lost or destroyed, such fact shall be reported to the collector at once for the purpose of obtaining from him a certificate of

payment. Such certificate shall be posted in place of the stamp; otherwise liability as above indicated for failure to post the stamp will be incurred. (See section 325.53.)

Treasury Decision 4929, Page 96 of the Internal Revenue Cumulative Bulletin:

“Section 463C.32. Treasury Department officers and Employees.—The officers and employees of the Treasury Department whose official duties require inspection of returns may inspect any such returns without making a special written application. If the head of a bureau or office in the Treasury Department, not a part of the Internal Revenue Bureau, desires to inspect or to have an employee of his bureau or office inspect a return in connection with some matter officially before him for information other than tax purposes, the inspection may, in the discretion of the Secretary, be permitted upon written application to him by the head of such bureau or office, showing in detail why the inspection is desired.

“Section 463C.33. Inspection by Branch of Government Other Than Treasury Department.—Except as provided in Section 463C.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government desires to inspect or to have some other official or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the Secretary of the Treasury, be permitted upon written application to him by the head of such executive department or other government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person who is desired to inspect the return. The information obtained under this section and Section 463C.32 may be used as evidence in any proceeding conducted by or before any department or establishment of the United States, or to which the United States is a party.

“Section 463C.34. Inspection by Government Attorneys. Any return shall be opened to inspection by a United States

Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in Section 463C.37, shall be addressed to the Commissioner and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States Attorney."

**Treasury Decision 5138, Internal Revenue Cumulative
Bulletin, 1942-17-11074, Page 99:**

"Section 458.611. Inspection of Excise Tax Returns. Pursuant to the above-mentioned provisions of law, excise tax returns filed with respect to any tax imposed by Chapters 7 or 12 or 21, of Subchapter A of Chapter 29 or Chapter 30 of the Internal Revenue Code, or filed after June 16, 1933 with respect to any tax imposed by Title IV, V, or VII of the Revenue Act of 1932, or filed with respect to the tax imposed by Title IV of the Revenue Act of 1934; or by any of the above-mentioned provisions as amended, shall be open to inspection to the same extent as provided with respect to tax returns in Subpart B, and Sections 463C.31, 463C.32, 463C.33(a), 463C.34, 463C.35, 463C.36 and 463C.37 of Subpart D of Treasury Decision 4929, approved August 28, 1939 (C.B. 1939-2, 91), as amended by Treasury Decision 4991, approved July 20, 1940 (C.B. 1940-2, 92) (26 C.F.R. 1939 Sup., 458.301 to 458.307, inclusive; 458.33 to 458.337, inclusive, 1940 Sup. 458.333(a))."

53 Stat. 394, Title 26, U.S.C., Section 3271

§ 3271. Payment of tax

(a) Condition precedent to doing business. No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

(b) Due date. All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liabil-

ity to a special tax commenced, to and including the 30th day of June following.

(c) How paid

- (1) Stamp. All special taxes imposed by law, including the tax on stills or worms, shall be paid by stamps denoting the tax.
- (2) Assessment

APPENDIX

JOINT APPENDIX

	Page
Information	1
Motion to Dismiss Information	4
Opinion, Municipal Court for the District of Columbia	9
Notice of Appeal	28
Agreed Statement of Proceedings and Evidence	28
Opinion, Municipal Court of Appeals for the District of Columbia	30
Order, Municipal Court of Appeals for the District of Columbia	34

JOINT APPENDIX

Information

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA Criminal Division

District of Columbia, ss: October Term, A. D. 1952
Charles M. Irelan, Esquire, Attorney of the United States
in and for the District of Columbia, who, for the said United
States, prosecutes in this behalf, by William W. Sewell,
Esquire, one of his assistants, comes here into Court, at the
District aforesaid, on the 7th day of October, in the year of
our Lord, one thousand nine hundred and fifty-two, in this
said Term, and for the said United States, gives the Court
here to understand and be informed, on the oath of one
Hugh J. McGee that one Frank Lewis late of the District
aforesaid, on the 13th day of December and on diverse other
days thereafter in the year of our Lord, one thousand nine
hundred and 51 with force and arms, at the District afore-
said, and within the jurisdiction of this Court, Frank Lewis
on December 13, 1951 and on diverse other days thereafter
during the month of December 1951 in the District of Co-
lumbia engaged in the business of accepting wagers, by
reason of such activity he was required by law to pay the
occupational tax (wagering) of Fifty Dollars (\$50.00) as
imposed by Section 3290 of Internal Revenue C he failed
to pay said tax, all in violation of Section 3294(a) In-
ternal Revenue Code: Title 26 U.S. Code Section 3294(a)
and Section 2707(a) Internal Revenue Code as made ap-
plicable by Section 3294(c) Internal Revenue Code
against the form of the statute in such case made and pro-
vided, and against the peace and Government of the United
States of America.

Whereupon, the said Attorney of the United States, who,
in this behalf prosecutes for the said United States, in man-

ner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Frank Lewis in this behalf to make him answer to the said United States touching and concerning the premises aforesaid.

(Seal)

CHARLES M. IRELAN

Attorney of the United States
in and for the District of
Columbia.

By WILLIAM W. SEWELL

His said Assistant.

Personally appeared Hugh J. McGee before me this 7th day of October, A. D. 1952, and being duly sworn according to law, doth declare and say that the facts as set forth in the foregoing information are true.

WILLIAM W. SEWELL

Assistant Attorney of the
United States in and for the
District of Columbia.

* * * * *

2

Filed Oct 7 11 2 AM '52

Walter F. Bramhall Clerk of Municipal Court
Washington, D.C.

7/6 G-Jail 29
Bond L. W.

No. 500702

United States NB

vs.

Frank Lewis 32 DeFrees St. N.W.

Occupational Tax Stamp Act.

Violation T 26 Sec 3290 U.S. Code

Atty Ehrlich

WITNESSES:

John Lynch Bureau of Internal Rev.

Oct 7 1952. Cont. 10-31-52 Deft. Bond set at \$500 JPC

Set for 1:30 pm. Mary C. Barlow Committed SFO

10/28/52 Motion to dismiss filed this date. Set 10-31-52.

Oct 31 1952. Cont. 11-12-52 Deft.

RGD TCS

Committed RE

Nov 12, 1952. Cont. 11-26-52 PM AJH Committed RE

Nov 26 1952 C 12-10-52 EHS AJH

Committed AR

Dec 10 1952. C 12-30-52 EHS reduced B 300 EHS AJH

Committed RE

Dec 30, 1952. Cont. 1/30/53 Govt

Committed RE FG MK

Jan 30 1953. Cont 6-3-53 Govt

S Frank H. Myers Committed RE

May 7 1953. Motion to be heard

May 22 1953. TCS

Judge Scalley

May 21 1953. Brief for Deft

submitted. Govt. to prepare brief to submit. C 6-5-53

JPC TCS

May 27 1953. Motion to extend time for filing of Govt.

Brief extended to and including July 6, 1953 granted.

JMB TCS

July 6, 1953. Brief of Government filed of this date. TCS

Judge Scalley

7-24-53. Motion to dismiss granted.

JPC TCS

August 3, 1953. Notice of Appeal filed. ALC

August 7, 1953. Designation of Record and Statement of
Errors filed. ALC

August 13, 1953. Statement of Proceedings and Evidence filed and submitted to Trial Judge. WN

August 18, 1953. Agreed Statement of Proceedings and Evidence filed and submitted to Trial Judge. WN

August 19, 1953. Agreed Statement of Proceedings and Evidence approved by Trial Judge. WN

* * * * *

5

Order

Upon consideration of the motion by the United States for an extension of time to and including July 6, 1953 within which to file its memorandum brief in opposition to motion to dismiss in the above entitled case, It is

ORDERED that the motion be, and it is hereby, granted.

(signed) THOMAS C. SCALLEY
Judge

Dated: May 27, 1953

* * * * *

6

Filed Oct 28 2:33 PM '52

Walter F. Bramhall Clerk of Municipal Court
Washington, D. C.

Motion To Dismiss Information

The defendant moves that the information filed herein against him be dismissed on the following grounds:

1. Chapter 27a of the Revenue Act of 1951, on which the information is based, is unconstitutional in that its provisions impose penalties upon the defendant in the guise of taxes.

2. Chapter 27a of the Revenue Act of 1951, upon which the information is based, contravenes the Fifth Amendment to the United States Constitution because the information required to be given by defendant in conformance with said Chapter compels defendant to be a witness against himself and to incriminate himself.

3. And for other reasons to be brought to the attention of the Court at the time this motion is argued.

(signed) MYRON G. EHRlich
Myron G. Ehrlich
Attorney for Defendant
Columbian Building

* * * * *

9 **Opinion**

The issue raised by both the Motion to Dismiss and brief in support thereof filed herein and in argument before this Court is the constitutionality of the occupational tax provisions of the Revenue Act of 1951¹ which among other things levies a tax on persons engaged in the business of accepting wagers, requires such persons to register with the Collector of Internal Revenue (now Director of Internal Revenue) and contains certain "posting" provisions. The unconstitutionality of these provisions is asserted on three grounds.

First, it is urged that the provisions of Chapter 27A of the Internal Revenue Code contravene the Fifth Amendment in that compliance with said provisions compels a person within the District of Columbia to give information which will incriminate or tend to incriminate him of a violation or violations of Federal law, to wit, Sections 1501, 1502, 1503, 1508 of Title 22 of the District of Columbia Code and also Section 371 of Title 18, United States Code.

Secondly, it is urged that Chapter 27A imposes penalties in the guise of taxes, as evidence of the commission of a Federal crime, to wit, violation of any or all of the sections of the District of Columbia Code and United States Code hereinbefore cited, is first required before the tax can be imposed and, therefore, the tax constitutes a criminal sanction and is a penalty and not a true tax.

¹ 26 U.S.C. Sec. 3285, 3290, 3291, 3293, 3275.

Thirdly, it is urged that Chapter 27A of the Internal Revenue Code contravenes the Fourth Amendment in that compliance with its provisions, specifically Sections 3275 and 3293 of Title 26, U.S.C. illegally compel disclosures which could be used as a predicate for the issuance of a warrant resulting in an unlawful search and seizure.

The United States in opposing the defendant's Motion to Dismiss filed a memorandum brief in support of its position urging that the case of *United States v. Kahringer*, U.S. , decided March 9, 1953, is controlling.

At the outset I find that there can be no doubt that criminal laws enacted by the Congress of the United States with respect to criminal activities within the District of Columbia are Federal laws¹ and this the United States necessarily so concedes.²

The defendant in this case is charged by information as follows:

11 "Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December 1951, in the District of Columbia *engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of \$50.00 as imposed by Section 3290 of Internal Revenue Code*, he failed to pay said tax, all in violation of Section 3294(a) Internal Revenue Code; Title 26 in violation of Section 3294 (a) and Section 2707 (b) Internal Revenue Code as made applicable by Section 3294 (c) Internal Revenue Code." (Italics supplied)

The United States, by the charging provision of this information concedes what is obvious from a reading of Chapter 27A of the Internal Revenue Code and the provisions contained therein, to wit, that it is only by reason of the fact that the defendant engaged in the business of accepting

¹ *Arnstein v. U. S.*, 54 App. D.C. 199, 296 F. 946, Cert. denied 264 U.S. 595.

Story v. Rives, 97 F. 2d 182, Cert. denied 305 U.S. 595.

² Memorandum in Opposition to Defendant's Motion to Dismiss the Information, filed by the United States of America, July 6, 1953, page 13.

wagers that it charges he was required by Section 3290, Title 26 U.S.C. to pay the tax.

For the United States to prove that this defendant is guilty as charged in the information filed herein would require the United States to prove at trial not merely that this defendant failed to register pursuant to Section 3291 of Title 26, U.S.C. and pay the occupational tax imposed by Section 3290 of Title 26, U.S.C. but further and necessarily that subsequent to the enactment of Chapter 27A of the Internal Revenue Code he engaged in the business of accepting wagers in the District of Columbia. Such proof, however, would constitute proof of a violation or violations of Federal law, to wit, certain sections of the District of Columbia Code, *supra*, and/or Section 371 of Title 18, U.S.C. In fact, the only persons within the District of Columbia who are required to comply with the provisions of Chapter 27A are those engaged in activities which have been made unlawful by Federal law.

Immediately, therefore, this case receives an entirely different complexion than was presented to the Supreme Court of the United States in the case of *United States v. Kahringer*, *supra*. A reading of the Reply Brief for the United States filed with the Supreme Court in that case, particularly pages 13 et seq., confirms this statement. The appellee in the Kahringer case, *supra*, had urged that the

12 registration provisions of Chapter 27A, *supra* compelled him to give testimony incriminatory under Federal as well as state laws, citing the Federal lottery laws, 18 U.S.C. 1301, 1302.¹ The United States urged that Chapter 27A could not be said, because of its registration provisions, to be on its face incriminatory under Federal statutes because other types of wagering other than possible violations of the Federal lottery laws were included in Chapter 27A and at most only a small proportion of persons subject to the wagering taxes might have a basis

¹ Reply Brief for the United States, *United States v. Kahringer*, page 13.

for raising the privilege against self-incrimination.¹ The United States argued further to the Supreme Court that inasmuch as only a small number of people might have reasonable cause to apprehend danger from complying, there was not created a setting which made the danger of prosecution for violation of the Federal lottery laws reasonably likely and concluded that the required report or return does not call for information which is incriminating on its face.² But the contention advanced by the United States in the Kahringer case, *supra*, I do not believe applies to the present case, for within the District of Columbia it is not any small group who might possibly tend to incriminate themselves by compliance with Chapter 27A, *supra*, but is every person who engages in any business activity within the District of Columbia which requires registration and is taxed under the provisions of Chapter 27A. All persons in the District of Columbia engaged in those gambling activities covered by Chapter 27A can reasonably fear that compliance with its provisions will tend to or will, in fact, incriminate them of violations of Federal law.

13 Again, the difference in posture between the Kahringer case and the instant case is made more readily apparent by a fuller reading of the briefs filed by the United States in the Supreme Court. These briefs will disclose that they were devoted to the question of application of these taxes on wagering activities *in the states* with the exception of the discussion of the Federal lottery laws heretofore noted. The United States argued throughout for the constitutionality of Chapter 27A of the Internal Revenue Code on the ground that there is no doubt that federal taxes can be imposed on occupations *forbidden by state law*. *As a matter of fact the United States took the position that wagering is not unlawful under any federal law*. In its reply brief, the United States stated at page 2 thereof:

¹ Ibid. page 16.

² Ibid. page 24.

"We submit that the registration requirements of Sec. 3291 clearly do not violate the Fifth Amendment. In the first place, *the occupation taxes is unlawful only under state laws*, and the federal privilege against self-incrimination protects only against inquiries incriminatory under federal law . . ." (italics supplied)

Again, at page 3 of its reply brief the United States stated:

"Section 3290 imposes a tax on the occupation of wagering. *Wagering is doubtless unlawful in many states (perhaps in all but Nevada), but it is not forbidden by any federal law.*

"Thus, *the registration statement in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals does not call for a disclosure of information which will reveal a violation of federal law.*

"It is established that the self-incrimination clause of the Fifth Amendment only relates to information incriminatory under federal law . . ." (italics supplied)

That the Congress of the United States can enact legislation which is valid requiring registration and payment of excise taxes on various business activities which are legal in some states and illegal in others there can be no doubt.

Such legislation has been sustained by the Supreme Court in many instances. Not only did the United States in its briefs in the Kahringer case, supra, cite those instances at great length but likewise did the Supreme Court rely on those same cases as corroborative of the power of Congress to so legislate.

I failed to find one single instance wherein the Supreme Court passed on any act of Congress which imposed a tax on an activity declared illegal by Congress and containing provisions for registration and payment of taxes which would compel a person engaged in such illegal activity to give answers which would tend to incriminate him. Nor has

the United States cited any such authority in the instant case. I may infer the reason for the lack of any such citation is that Congress has not passed any such tax legislation except the instant Act now being attacked.

The various cases cited by the United States in its briefs in the Kahringer case and cited with approval by the majority in its opinion therein, such as the License Tax cases, 5 Wall. 462; *Nigro v. United States*, 276 U.S. 332; *United States v. Sonzinsky*, 300 U.S. 506; *United States v. Sanchez*, 340 U.S. 42, and the remainder dealt solely with cases construing statutes imposing taxes and requiring registration by the person engaging in such activities, but in not one single instance can I find where Congress made any such activity unlawful if the tax was paid and the registration procedures complied with. Such is not the posture of the present case. Further, the United States in its reply brief at page 23 in the Kahringer case relied on several Prohibition Act cases and said:

“... The cases sustaining the authority of Congress to impose taxes on occupations illegal under federal law are especially significant in this connection. It was held in a number of cases that persons engaged in selling liquor during the period of national prohibition were still required to pay the federal taxes on the forbidden traffic. *United States v. Stafoff*, 260 U.S. 477, 480; *United States v. One Ford Coupe*, 272 U.S. 321, 327; *United States v. Sullivan*, 274 U.S. 259, 263.”

15 But to the contrary, however, I find that those very cases support this defendant. The United States completely overlooked Section 35 of Title II of the National Prohibition Act which reads in part as follows:

“No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with

an additional penalty of \$500 on retail dealers and \$1,000 on manufacturers." (*italics supplied*)

Accordingly, since no liquor revenue stamps or tax receipts for any illegal manufacture or sale were to be issued in advance, there was no requirement such as is present in the wagering tax law which compels a person to give evidence against himself in an endeavor to comply with its provisions.

An additional point which was strongly urged by the United States in its memorandum brief is that the wagering tax applies to future acts and not past acts and, therefore, the privilege against self-incrimination is not available and cites for its authority in support thereof that portion of the opinion of the Supreme Court in the Kahringer case which reads as follows:¹

"Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed, 8 Wigmore (3d ed., 1940) Sec. 2259(c). If respondent wishes to take wagers subject to excise taxes under Sec. 3285, *supra*, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

Even if, for the sake of argument, it were to be admitted that this contention in general is sound, I feel it
 16 would fall in the District of Columbia by the virtue of the criminal sanctions that can be imposed under Section 371 of Title 18, U.S.C. For even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and

¹ Slip Opinion, page 10.

in pursuance of that conspiracy one of the conspirators applied for a tax stamp, such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction. And I believe that even if Chapter 27A, *supra*, contained the words "before going into the business", which it does not, or if it incorporated by reference Section 3270 of Title 26, U.S.C. which will be discussed later, the foregoing examples would still apply.

However, I find that the United States' contention is neither supported by a review of Chapter 27A of the Internal Revenue Code nor the cases cited in support thereof. The foregoing quotation from the Supreme Court opinion is a paraphrase of language first appearing in the reply brief of the United States in the *Kahringer* case, *supra*, (pages 27 and 28) wherein the argument that the tax applies in future was first raised. However, the cases cited by the United States and also cited by the Supreme Court in its opinion, I believe, are not authority for that statement. The cases cited were *Cf. Davis v. United States*, 328 U.S. 582, 590; *Shapiro v. United States*, 335 U.S. 1, 35; *E. Fongera & Co. v. City of New York*, 224 N.Y. 269, 281, 210 N.E. 692.

In *E. Fongera & Co., Inc. v. City of New York*, *supra*, a city ordinance required dealers in patent medicines to register the names of ingredients for which therapeutic effects were claimed with the Department of Health. The plaintiffs contended the ordinance violated their privilege against self-incrimination in that a disclosure of the ingredients would tend to convict them of using improper ingredients in contravention of health laws. Justice Cardozo, in determining that the Fifth Amendment was not violated, said:

"The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. *He is simply notified of the conditions upon which he may do*

business in the future. He makes his own choice. To such a situation, the privilege against self-accusation has no just application." (italics supplied)

As will be observed, a dealer in patent medicine who used proper ingredients would be permitted to do business without interference from the Health Department provided he complied with the conditions, namely, a description of the ingredients used. In other words, by complying he would be licensed to engage in the business subject to no Governmental interference contrary to the result if this defendant complied with the provisions of Chapter 27A.

In *Shapiro v. United States*, supra, quoting from *Davis v. United States*, supra, re certain records required by law to be kept by a citizen, the situation was entirely different than the one posed in the instant case. There the majority held that the Federal Government had the power to regulate the business under the Price Control Act, required certain records to be kept and compliance with the Act licensed the person to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of Governmental regulation. If, as was pointed out therein, the person required to keep the books violates the Act and in making entries the commission of that crime by him is reflected, the criminality of the entries exists by his own choice and election. He would not, if he kept his own books and records and made proper entries, incriminate himself of any other federal act and would be, as has been said previously, licensed to engage in the business without fear of incriminat-

ing himself under some other federal law. Therefore,
18 those cases justifying the requirement of keeping
and producing public records because of a licensing
or regulatory power are not applicable to this case.

Nor is the treatise by Professor Wigmore which was also cited applicable in the instant case.¹

¹ 8 Wigmore (3d Ed. 1940) Sec. 2259(c).

"... The duty or compulsion to disclose the books existed generically, and prior to the specific act; ... the duty or compulsion is directed to the generic class of acts, not the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty ..."

and concluded:

"The generalization, therefore, may be made that there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which is a particular one, may or may not in future be criminal at the choice of the party reporting ...".

In disposing of the application of Professor Wigmore's statement to the instant case it is clear that the Federal criminal laws involved here antedate Chapter 27A, *supra*. Further, the duty or compulsion to register and pay the tax is directed to the criminal act and is subsequent to the doing of the criminal act and not prior thereto. When the Supreme Court stated that the appellee in the *Kahringer* case, *supra*, was not compelled to confess to criminal acts already committed, it was merely passing on a statute which, when applied to a person who by registering might admit past acts in violation of state law, would not by such registration be admitting past acts in violation of Federal law. I have hereinbefore set forth excerpts from the briefs of the United States in the *Kahringer* case, *supra*, for the purpose of showing that the United States repeatedly pointed out to the Supreme Court that there were

19 "at present" no Federal laws prohibiting wagering activities covered by Chapter 27A, *supra*. Therefore, if it were true that "at present" there are no Federal laws prohibiting the wagering activities covered by Chapter 27A, this act would, in fact, be prospective in its application. It could then be properly called in futuro. But the fallacy in the argument of the United States when applied to this case

is that there are Federal laws prohibiting in the District of Columbia every type of wagering activity covered by Chapter 27A. Accordingly, in the District of Columbia, the Act applies to past acts in violation of Federal law and is not prospective in its application.

In arriving at the conclusion that Section 3290 applies to past acts and not future acts, it is necessary to review the pertinent provisions of Chapter 27A of the Internal Revenue Code. I can find no single line or word therein which could enable a conclusion other than registration and the payment of the tax required until a person has first engaged in an activity covered by Chapter 27A. An analysis of Chapter 27A will disclose the following:

Section 3290 of the Internal Revenue Code provides:

“Sec. 3290. Tax.

“A special tax of \$50 per year shall be paid by each person *who is liable for tax under subchapter A or who is engaged in receiving wagers* for or on behalf of any person so liable.” (italics supplied)

Now, however, in order to understand who is liable for the tax imposed by Section 3290, *supra*, it of necessity requires a reading of Subchapter (a) of Chapter 27A of the Internal Revenue Code.

Section 3285(d), Title 26 U.S.C. (Chapter 27A of the Internal Revenue Code, subchapter A) defines the persons liable for the tax. That subsection reads as follows:

“(d) Persons liable for tax.

“Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.”

20 In addition to the definition contained in the statute itself, the Bureau of Internal Revenue has interpreted the meaning of "engaged in business" in Regs. 132, relating to excise and special tax on wagering under Chapter 27A of the Internal Revenue Code (Part 325 of Title 26), Codification of Federal Regulations, and as amended July 16, 1952.

"SEC. 325.21. Scope of tax

"(b) *A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.*" (italics supplied)

Regs. 132, Section 325.25(a), "When tax attaches" reads as follows:

"SEC. 325.25. When tax attaches.

"(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor.* In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor." (italics supplied)

Quite obviously, therefore, in the light of the statute itself, as well as the interpretation appearing in the Regulations, a person is not liable for the payment of the occupational tax until he has accepted a minimum of one wager but a more reasonable interpretation probably is the one made by the Bureau of Internal Revenue, namely, making it a practice to accept wagers. Until such a practice is shown

21 there is no liability under Section 3290. The Government has impliedly conceded the accuracy of the statement in the charging portion of the information, supra, wherein it states that it is by reason of such activity, to wit, engaging in the business of accepting wagers, that the defendant was required to register.

It is true that the Bureau of Internal Revenue amended Regs. 132 on July 16, 1952, which now reads in part as follows:

"Sec. 325.50. *Registry, return and payment of tax.*
(a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code . . ."

* * * * *

"(c) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may accept wagers on his behalf . . .

"(d) Each agent or employee of a person accepting wagers shall report on Form 11-C the name and residence address of each person (i.e., individual partnership, corporation, etc.) on whose behalf wagers are to be accepted. . . ."

I fail to find any language in Chapter 27A, supra, on which the Bureau of Internal Revenue can rely in support of this amended regulation. I feel the Bureau of Internal Revenue has misconceived the meaning of Section 3271 of Title 26, U.S.C. and has failed to realize that Section 3270 of Title 26, U.S.C. is *not applicable* to Chapter 27A as Section 3292 of Title 26 U.S.C., which incorporated certain

other sections by reference, omits it. Section 3292 reads as follows:

“Sec. 3292. *Certain provisions made applicable.*

22 “Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply.” (italics supplied)

The Bureau of Internal Revenue has drafted Section 325.50, supra, as though Section 3270 had been incorporated by reference. Section 3270 reads as follows:

“Sec. 3270. Registration.

“(a) Requirements. Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place *where such trade or business is to be carried on*. In case of a firm or company, the names of the several persons constituting the same, and the places of residence, shall be so registered.” (italics supplied)

But Section 3291, Title 26 U.S.C. which was substituted for the foregoing reads as follows:

“Sec. 3291. Registration.

“(a) *Each person required to pay a special tax under this subchapter shall register with the collector of the district—*

“(1) *his name and place of residence;*

“(2) *if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and*

“(3) *if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.*

“(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

23 “(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required under this section as may be needful to the enforcement of this chapter.” (italics supplied)

Section 3271(a) must be read hand in hand with the foregoing sections. It reads as follows:

“Sec. 3271. Payment of tax.

“(a) Condition precedent to doing business. No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor *in the manner provided in this chapter.*” (italics supplied)

As stated previously, the interpretation the Bureau has given to Section 3271(a) is as if that section read “no person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor.” However, as will be observed, Section 3271(a) is not so limited but concludes “. . . until he has paid a special tax therefor in the manner provided in this chapter.”

Congress did not incorporate Section 3270 by reference. (See Section 3292). In its place it drafted new sections, to wit, Sections 3285, 3290 and 3291, predicated the liability for the tax and requirements for registration on the fact that a person is engaged in the business, not on the premise that he is going to engage in the business. Therefore, the manner provided for in this chapter is to pay the \$50 tax by stamp and register when liable for the tax imposed by subchapter A.

I believe that the above interpretation is accurate and that Chapter 27A can be subjected to no other construction

is made further apparent by reference to the Committee Reports dealing with the wagering tax. The United States in its brief in *U. S. v. Joseph Kahringer*, *supra*, stated at page 14 thereof:

24 “As we have noted, the Committee Reports state that the occupational tax is an ‘integral part’ of the plan for collecting the 10 per cent tax on wagers. *The registration provisions are directly related to the enforcement and collection of both taxes.* The taxes affect a large and complex business operated by a class of citizens from whom willing compliance and cooperation are not to be expected. It unquestionably facilitates the collection of a tax on a business to have the person engaged in such business specify his name, address and place of business and the names and addresses of the persons either who carry on the business for him or for whom he carries on the business . . .” (*italics supplied*)

In making that statement the U. S. relied on the statement appearing in H. Report 586, page 60, S. Report 781, page 181, wherein it was stated:

“The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, *the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers.*” (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118) (*italics supplied*)

It is thus observed that the Congressional intention was that information demanded by the registration form must be given, when the person liable for the tax imposed by subchapter A, appears to pay the \$50 occupational tax.

I believe the information required calls for answers that this defendant could reasonably fear would incriminate or tend to incriminate him of a violation or violations of Federal law. This is all that is required to bring into effect the Fifth Amendment. The most recent enunciation re self-incrimination is in *Hoffman v. United States*, 71 S. Ct. 814, 818, where the Court said:

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (*Patricia*) *Blau v. United States*, 1950, 340 U.S. 159, 71 S. Ct. 232 . . ."

25 Nor should Section 472, Effective Date of Part VII, which is contained in Chapter 27A, *supra*, be overlooked.¹ As will be observed, the first time a person is liable for the tax imposed by Section 3290 which is incorporated in Subchapter (B) is on the same day that a person engaged in wagering activities within the purview of Chapter 27A first is liable for the 10 per cent tax under Subchapter (A) of Chapter 27A, *supra*. Certainly, if Congress had intended that the \$50 tax and registration should be paid before the acceptance of a wager, it would have so provided in the foregoing "grace period" provision.

Further, the existence of various Treasury Regulations² and the policies of the Bureau of Internal Revenue as stated to this court by defense counsel to make the return available to prosecuting officials and not contradicted by the United States lend further basis for the well founded per-

¹ "The tax imposed by subchapter A of Chapter 27A, as added by section 471, shall apply only with respect to wagers placed on or after the first day of the first month which begins more than 10 days after the date of enactment of this Act. No tax shall be payable under subchapter B of Chapter 27A, as added by section 471, with respect to any period prior to the first day of the first month which begins more than 10 days after the date of enactment of this Act. . . ."

² Treasury Decision 4929, Sections 463C.32, 463C.33, 463.34. Treasury Decision 5138, Section 458.611.

turbation that this defendant has with respect to compliance with Section 3290.

It is obvious that compliance would result in his giving to the United States Attorney in this District the best of proof to go further and prosecute him and others associated with him in the business of gambling in the
 26 District of Columbia for violation or violations of the District of Columbia Code as well as Section 371 of Title 18, U.S.C. and Sections 1301, 1302 of Title 18, U.S.C.

One other point was advanced by the United States in its Memorandum, wherein relying on the case of *United States v. Sullivan*, 274 U.S. 259, it contended that this defendant was not entitled the privilege against self-incrimination in that he had failed to file a return. In this regard the United States pointed out that the majority opinion in the *Kahringer* case, *supra*, had likewise made reference to the *Sullivan* case. The majority opinion states:¹

“Appellee’s second assertion is that the wagering tax is unconstitutional because it is a denial of the privilege against self-incrimination as guaranteed by the Fifth Amendment.

“Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for. In *United States v. Sullivan*, 274 U. S. 259, defendant was convicted of refusing to file an income tax return. It was assumed that his income ‘was derived from business in violation of the National Prohibition Act.’ *Id.*, at 263. ‘As the defendant’s income was taxed, the statute, of course, required a return. See *United States v. Sischo*, 262 U.S. 165. In the decision that this was contrary to the Constitution, we are of the opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.’ 274 U.S., at 263.”

¹ Slip Opinion, page 10, *U. S. v. Kahringer*.

However, I believe there is a broad distinction between the present case and the facts in the Sullivan case, *supra*. All that the Sullivan case held was that a person who was a bootlegger in contravention of the National Prohibition Act could not fail to file an income tax return and pay the tax even though the return contained some questions
 27 the answers to which might tend to incriminate him.

The court in that case said that his procedure was to file the return, pay the tax and then object to answering those questions in the return that might tend to incriminate him. However, that cannot be done under this statute. The statute requires a person who is liable for the 10 per cent tax to pay the \$50 occupational tax and register, giving answers with respect to where his place of business is, who his associates are, if any, etc. and such answers will quite obviously incriminate or tend to incriminate him. Nor can the Bureau of Internal Revenue issue a tax stamp unless all the information required by the statute is given and as this court knows the Supreme Court denied certiorari in *Combs v. Snyder*, 101 F. Supp. 531 (D.D.C.) affirmed 342 U.S. 939, where an individual in this district endeavored to obtain a stamp without giving all the answers required and the Collector of Internal Revenue refused to issue a stamp. In that case a statutory three-man court convened pursuant to Title 28, U.S.C., Section 2282, and refused to aid the applicant in obtaining a stamp on the ground that he came in with unclean hands.

In passing it might be observed that the United States at page 9 of its Memorandum opposing the Motion to Dismiss cites *Combs v. Snyder*, *supra*, as holding the wagering tax law to be constitutional. A reading of the opinion of the United States Court of Appeals for the District of Columbia will disclose that that court did not pass on the constitutionality of the case but denied the plaintiff's motion for preliminary injunction on the ground that a court of equity will deny its aid to one who does not come into court with clean hands. In this regard it should be noted that the

United States in its brief in the Kahringer case, *supra*, stated in a footnote at page 9 the following:

“The *Combs* decision was based primarily on the doctrine of unclean hands and the Government’s motion to affirm was based on that principle.”

28 Quite obviously, therefore, this defendant could not pay the tax and file a return without giving answers which would tend to incriminate him due to two reasons, namely, that the statute and registration form require the giving of the answers, and, secondly, the Supreme Court has determined that all the answers called for by Section 3291, Title 26, U.S.C. must be given. Nor could this defendant pay the tax and be in compliance with Chapter 27A of the Internal Revenue Code by merely sending in a check because the Act incorporates by reference Section 3271 which states the only way the tax can be paid, namely, by stamps denoting the tax.

In concluding, with respect to the question of self-incrimination the following comes to the mind of the court. In every instance in the past years that Congress has legislated and required a registration and the payment of a tax prior to a person engaging in a particular activity the payment of the tax involved assured the registrant of freedom from Federal prosecution for engaging in the activity provided he complied with the provisions of the particular act. In the instant case, however, the defendant is told that he must register and pay a \$50 tax but not be entitled or licensed to engage in the activities subject to the Act and, further, by such compliance assures himself as positively as he can that he will be prosecuted for engaging in such activities. Accordingly, I believe that a compliance with the registration provisions and payment of the tax required by Chapter 27A, *supra*, would cause the defendant to incriminate or tend to incriminate himself of violations of many Federal laws, all of which completely prescribe the activities covered by this Chapter.

Having determined that the provisions of Chapter 27A of the Internal Revenue Code are in contravention of the Fifth Amendment and require this court to sustain the motion to dismiss filed herein, the court sees no necessity for discussing at length the other points raised by the defendant in his Motion to Dismiss, brief and argument. In passing, however, the court feels some comment should be made with respect to the other two questions raised by him.

With respect to the question of whether or not the tax involved is a penalty in the guise of a tax, a serious question is presented by the defendant in this regard. I have read carefully the language of the Supreme Court in the case of *United States v. Sanchez*, supra, wherein the court stated:

"Second. The tax levied by Sec. 2590(a)(2) is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute. Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. The fact Congress provided civil procedure for collection indicates its intention that the tax be treated as such. *Helvering v. Mitchell*, 1938, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917. Moreover, the Government is seeking to collect the levy by a judicial proceeding with its attendant safeguards. Compare *Lipke v. Lederer*, 1922, 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061; *Tovar v. Jarecki*, 7 Cir., 1949, 173 F. 2d 449."

Appellant United States' Statement as to Jurisdiction, page 5 thereof, filed with the Supreme Court in *United States v. Sanchez*, supra, reads in part as follows:

"There is no liability attached to the transfer of marihuana. It is the failure to pay the tax that gives rise to the criminal liability and not as in *Lipke v. Lederer* the criminal liability which creates the tax obligation."

Further, page 8 thereof reads in part as follows:

30 "The effect of the ruling below if allowed to stand is to remove all criminal sanctions upon the possession or transfer of untaxed marihuana. The only crime defined by federal law with respect to marihuana is the possession or transfer of untaxed marihuana. If the tax imposed is a penalty then the crime of possessing non-tax paid marihuana no longer exists."

Page 27 thereof reads in part as follows:

"In the present case the tax laid by Section 2590 (a)(2) is not conditioned upon commission of a crime. The tax is upon the transfer of marihuana to a person who has not paid the special tax and registered under Sec. 3230 and 3231. Such a transfer is not made a crime by the statute nor is the tax conditioned upon its being shown that the transfer is made criminal or unlawful by other provisions of law. The only transfers made unlawful by the Act are: (1) A transfer not in pursuance of an official order form (Sec. 2591); and (2) A transfer by a person who has not paid the special tax and registered, Sec. 3234. Acquisition of the drug by any person without having paid the transfer tax is also unlawful, Sec. 2593. It is thus the failure to pay the tax, either the special or transfer tax or the acquisition of the drug without a proper order form, which gives rise to criminal liability and not as in the *Lipke* and *Constantine* cases the criminal liability which gives rise to the tax."

The foregoing quotations reflecting the United States' position and the language of the Supreme Court compel the conclusion that if the Congress had seen fit to make the possession of marihuana a crime the Court would not have sustained the tax as a valid exercise of the taxing power but would have held that since evidence of the commission of

a crime was required before the tax could be imposed, it was a penalty and could not be collected. Quite obviously in the present case evidence of the commission of a crime is called for before the tax becomes owing and due because the tax under Section 3290 is not owing and due until the person is liable under subchapter (a) of Chapter 27A of the Internal Revenue Code and, if liable, such liability arises only by doing an act in violation of Federal law, thus making it a penalty and not a tax.

With respect to the defendant's argument that by virtue of Section 3275, Title 26, U.S.C. and Section 3293, Title 26, U.S.C. the defendant would be deprived of the protection of the Fourth Amendment, I believe that there is substance to that argument but do not feel required to pass on it in light of all the foregoing.

31 In concluding, I wish to re-emphasize my strong and always abiding desire to afford the privilege and protection of the Fifth Amendment to those invoking its protection when I believe that the person claiming the privilege has a reason to fear that his actions or statements may tend to incriminate him. Let it never be forgotten that the Fifth Amendment of our Constitution was not adopted to protect the innocent, for the innocent need no such protection. It was adopted to protect those charged with guilt so that they would not be forced to give forth with evidence, documentary or oral, which would bring about their conviction. To say that this defendant, as the United States has said, or any others, engaging in similar activities can avoid the perils of prosecution by refraining from engaging in gambling activities and, accordingly, not be required to register is the purest form of sophistry. This act is supposed to be a revenue raising measure.

Motion to Dismiss granted.

THOMAS C. SCALLEY
Judge

* * * * *

32

Filed Aug. 3 1953

Notice of Appeal

Name and address of appellant: United States of America.

Offense: Violation of the Occupational Tax Stamp Act, 26 U.S.C. § 3290, 3294 (a), 3294 (c) and 2707 (b).

Brief description of judgment or order: Motion to Dismiss granted.

Date of judgment or order: July 24, 1953.

The United States of America hereby appeals to the Municipal Court of Appeals for the District of Columbia from the judgment or order above mentioned.

/s/ LEO A. ROVER
Leo A. Rover,
United States Attorney.

* * * * *

34

Filed Aug. 18, 1953

Agreed Statement of Proceedings and Evidence

Comes now the United States of America by its attorney, the United States Attorney, and the defendant by his attorneys, Walter E. Gallagher and Myron G. Ehrlich, and make the following agreed statement of proceedings and evidence.

On October 7, 1952, an information was filed against Frank Lewis, the defendant herein, in the Criminal Division of the Municipal Court, wherein it was charged that on December 13, 1951, and on diverse other days thereafter during the month of December, 1951, in the District of Columbia, he engaged in the business of accepting wagers, that by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars (\$50.00) as imposed by Section 3290 of Internal Revenue Code, and that he failed to pay the said tax, all in violation of Section 3294(a) Internal Revenue Code; Title 26 U.S.

Code Section 3294(a) and Section 2707(b) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code. On October 28, 1952, Frank Lewis moved to dismiss the information on the grounds that Chapter 27A of the Revenue Act of 1951 is unconstitutional because its provisions (1) impose penalties in the guise of taxes and (2) require a defendant to be a witness against himself and to incriminate himself in violation of the Fifth Amendment and (3) for other reasons to be brought to the attention of the court at the time of the argument on the motion.

After several continuances, the oral hearing on the motion to dismiss was held on May 21, 1953, at which time defendant by his attorneys raised the additional ground that Chapter 27A of the Revenue Act of 1951 contravenes the Fourth Amendment of the Constitution and filed a Memorandum in Support of Motion to Dismiss. Thereafter the Government filed a written opposition thereto. On July 24, 1953, the trial court granted the motion to dismiss and handed down a written opinion in connection therewith.

/s/ LEO A. ROVER
Leo A. Rover,
United States Attorney;

* * * * *

/s/ WALTER E. GALLAGHER
Walter E. Gallagher,

/s/ MYRON G. EHRLICH,
Myron G. Ehrlich,
Attorneys for Defendant.

August 24, 1953

Approved

(signed) THOMAS E. SCALLEY
Judge

Opinion

THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

No. 1387

UNITED STATES, APPELLANT,

v.

FRANK LEWIS, APPELLEE.

Appeal from The Municipal Court for the
District of Columbia,
Criminal Division.

(Argued October 5, 1953 Decided November 6, 1953)

Lewis A. Carroll, Assistant United States Attorney, with whom *Leo A. Rover*, United States Attorney, and *William J. Peck*, *Kenneth D. Wood*, and *Alexander L. Stevas*, Assistant United States Attorneys, were on the brief, for appellant.

Walter E. Gallagher, with whom *Myron G. Ehrlich* and *Joseph Sitnick* were on the brief, for appellee.

Before CAYTON, Chief Judge, and HOOD and QUINN, Associate Judges.

CAYTON, *Chief Judge*: Frank Lewis was charged by information with having engaged in the business of accepting wagers without paying the occupational tax imposed by Chapter 27A of the Internal Revenue Code, 26 U.S.C. § 3285 *et seq.* (Supp. V, 1952). He moved to dismiss the information and the trial court granted his motion, holding in a written opinion that Chapter 27A is unconstitutional because it compels a defendant to give self-incriminating information and imposes a penalty in the guise of a tax. From that decision the United States has brought this appeal.

Determination of the constitutionality of an act of Congress is, as the Supreme Court has said, one of the most

serious responsibilities of the judiciary. "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or inadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare." *Nicol v. Ames*, 173 U. S. 509, 514.

Much greater has been the unwillingness of courts of first instance to strike down acts of Congress. Out of an awareness of the serious nature of such a procedure and out of a concern for uniform enforcement of federal laws has grown more than a rule of law: a sound and well-defined public policy has been established among the United States District Courts of resolving every intendment in favor of acts of Congress and refraining from nullification of such acts unless some plain mandate of the constitution is clearly shown to have been violated.¹ Thus it has been said: "... before pronouncing an act of Congress unconstitutional and unenforceable, a District Court should be even more carefully deliberate and firmly convinced beyond a reasonable doubt of its unconstitutionality than would be necessary on the part of a Circuit Court of Appeals or of the Supreme Court of the United States. A District Court is a one-man court. There are numerous District Courts; and the result of conflicting views of individual District Judges as to the unconstitutionality of acts

¹ *La Croix v. United States*, W.D. Tenn., 11 F. Supp. 817, *appeal dismissed*, 6th Cir., 85 F. 2d 569; *Bemis Bro. Bag Co. v. Feidelson*, W.D. Tenn., 13 F. Supp. 153; *In re Moore*, E.D. Pa., 8 F. Supp. 393; *Mather v. MacLaughlin*, E.D. Pa., 57 F. 2d 223; *United States v. 458.95 Acres of Land*, E.D. Pa., 22 F. Supp. 1017.

of Congress leads to a frequently confusing status in the enforceability of national laws. Wherefore District Courts should be most reluctant to pronounce acts of Congress void. The soundest public policy is conserved when District Courts do not interfere with the operation of acts of Congress. Pending the final decision of the Supreme Court of the United States, nullification of laws in some districts and their enforcement in other districts leads to much confusion and inequality."¹

To this we would add that a still greater duty of self-restraint rests on courts of limited jurisdiction like the Municipal Court. Such a court should not challenge the right of Congress to make a law unless unconstitutionality is glaring and it is manifest that Congress has exceeded its grant of power.

In applying this test we note first that the wagering tax act here involved has been held valid by a three-judge federal court in this jurisdiction. *Combs v. Snyder*, D.C.D.C., 101 F. Supp. 531, *affirmed without opinion*, 342 U. S. 939. Six other district courts have likewise upheld the constitutionality of the same act.² And in the only case in which a district court held the act invalid there resulted a reversal by the Supreme Court. *United States v. Kahringer*, 345 U. S. 22, *rehearing denied*, 345 U. S. 931. There the highest Court held that the act did not prescribe a penalty or require self-incriminating revelations in violation of the fifth amendment.

Discussing the *Kahringer* decision at length in his opinion, the trial judge found the present case distinguishable. He held compliance with the act would involve self-incrimination, because registration is required only after wagers have been accepted. Therefore, he said, since District of Co-

¹ *La Croix v. United States*, *supra*, at 820.

² *United States v. Penn*, M.D. N.C., 111 F. Supp. 605; *United States v. Robinson*, E.D. Mich., 107 F. Supp. 38; *United States v. Smith*, S.D. Cal., 106 F. Supp. 9; *United States v. Nadler*, N.D. Cal., 105 F. Supp. 918; *United States v. Forrester*, N.D. Ga., 105 F. Supp. 136; *United States v. Arnold, Jordon & Wingate*, E.D. Va., (No. 478 decided Sept. 18, 1952).

lumbia laws make the acceptance of wagers a crime,¹ and since such laws are federal laws, one who registers under the act, giving his name and address, and his employees' names and addresses, would necessarily be giving evidence tending to incriminate himself of a violation of federal law. This position is directly contrary to the Supreme Court's ruling in the *Kahriger* case, where it was said: "Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for . . . Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. . . . If respondent wishes to take wagers subject to excise taxes under § 3285, *supra*, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."²

Thus the *Kahriger* opinion construed the act to require registration before entering the business of accepting wagers, and held that such was valid and proper. It was not open to the Municipal Court to adopt a different construction.

The trial court also said "even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the conspirators applied for a tax stamp such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction." That statement is answered in the words we

¹ Code 1951, § 22-1501 through § 22-1508; 18 U.S.C. § 371 (Supp. V, 1952).

² *United States v. Kahriger*, *supra*, at page 32.

have already quoted from the *Kahriger* decision to the effect that one who has not registered has no right to claim the constitutional privilege:

The second basis for the decision of the trial court, i.e., that the act imposes a penalty in the guise of a tax, is likewise contrary to the holding in *Kahriger*, which, as we have just said, validates the requirement that registration and payment of the tax are necessary before the named business is entered into.

Various other matters and contingencies are discussed in the opinion below, and urged upon us in appellee's brief here, some by way of speculation and others in the form of predictions in terrorem. We consider them to be subordinate to the vital issues we have discussed, and wholly insufficient to support the ruling of unconstitutionality.

Reversed.

* * * * *

44

Order

Appeal from the Municipal Court for the District of Columbia, Criminal Division. This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be, and it is hereby, remanded to the said Municipal Court for further proceedings in accordance with the opinion of this Court.

NATHAN CAYTON,
Chief Judge.

November 6, 1953.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12009

FRANK LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA, CRIMINAL DIVISION

LEO A. ROVER,
United States Attorney.

KENNETH D. WOOD,
ALEXANDER L. STEVAS,
LEWIS A. CARROLL,
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAR 10 1954

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

This is an appeal from the judgment of the Municipal Court of Appeals which reversed the order of the trial court dismissing the information filed against appellant. In the information, appellant is charged with having engaged in the business of accepting wagers although he had not registered under the Occupational Tax Act and paid the requisite \$50 tax.

In the opinion of appellee, the following questions are presented:

1. Is not the question of the constitutionality of the Occupational Tax Act as a penalty in the guise of a tax, foreclosed to appellant, the Supreme Court having decided that such Act is a revenue measure.

2. Can the privilege against self-incrimination be raised by one who has not registered for the Occupational Tax Act.

3. Is the payment of the occupational tax a condition precedent to the engaging in the business of accepting wagers.

INDEX

	Page
Counterstatement of the case.....	1
Constitutional provisions and statutes involved.....	4
Summary of argument.....	8
Argument:	
I. The Wagering Tax Act is not a penalty in the guise of a tax..	9
1. Similar laws have been declared constitutional.....	9
2. The Wagering Tax Act is constitutional.....	10
3. The Wagering Tax Act produces revenue.....	11
4. The penalty provisions of the Wagering Tax Act aid in the collection of the tax and are valid.....	11
5. The registration requirements are necessary.....	12
6. The Wagering Tax Act is definite and certain.....	12
7. The Supreme Court has followed <i>Kahriger</i> in subsequent cases.....	13
II. Appellant cannot claim the privilege against self-incrimination because he has not registered for the tax.....	15
III. The occupational tax is a condition precedent to doing business and, therefore, the privilege against self-incrimination cannot be raised because such privilege only applies to past acts....	19
1. The occupational tax applies only to future acts.....	22
2. Subchapter A is not in issue.....	25
3. Appellant cannot claim the privilege against self-incrimi- nation as to a possible conspiracy.....	26
4. Appellant cannot raise the Fourth Amendment.....	26
5. The privilege has no application to information required to be filed in connection with the collection of taxes....	27
6. The distinction between federal law and state law is immaterial in the instant case.....	29
Conclusion.....	31

CITATIONS

Table of cases:

<i>Alston v. United States</i> , 274 U. S. 289.....	9
<i>Arnstein v. United States</i> (1924), 54 App. D. C., 199, 296 Fed. 946, cert. denied, 264 U. S. 595.....	29
<i>Berron v. Baltimore</i> , 7 Pet. 243.....	30
<i>Boyd v. United States</i> , 116 U. S. 616.....	28
<i>Brown v. Walker</i> , 161 U. S. 591, 606.....	30
<i>Cararola v. United States</i> , 111 F. 2d 243 (C. A. 3).....	30
<i>Casey v. United States</i> , 276 U. S. 413.....	9
<i>Combs v. Snyder</i> (1951) (D. C. D. C.), 101 F. Supp. 531, affirmed, 342 U. S. 939 (1952).....	12, 18, 31
<i>Counselman v. Hitchcock</i> , 142 U. S. 547.....	30
<i>Davis v. United States</i> , 328 U. S. 582, 590 (1946).....	22, 28

Table of cases—Continued

	Page
<i>E. Fougere Co. v. City of New York</i> , 224 N. Y. 269, 120 N. E. 642..	22
<i>Feldman v. United States</i> , 322 U. S. 487, 491-492.....	30
<i>Felsenheld v. United States</i> , 186 U. S. 126.....	9
<i>Graham v. United States</i> , 99 F. 2d 746 (C. A. 9).....	30
<i>Hale v. Henkel</i> , 201 U. S. 43.....	26, 30
<i>Hoffman v. United States</i> , 341 U. S. 479 at 490 (1951).....	22
<i>Irvine v. California</i> , — U. S. — (No. 12) (decided February 8, 1954).....	8, 13, 18, 26, 27, 30, 31
<i>In re Kellock</i> , 165 U. S. 526.....	9
<i>Jack v. Kansas</i> , 199 U. S. 372.....	30
<i>Mason v. United States</i> , 244 U. S. 362.....	17
<i>McAlister v. Henkel</i> , 201 U. S. 90.....	26
<i>Miller v. United States</i> , 95 F. 2d 492 (C. A. 9).....	30
<i>Mosely v. United States</i> , 207 F. 2d 908 (5th Cir. 1953).....	15
<i>Rogers v. United States</i> , 340 U. S. 367 at 370-371 (1951).....	16, 26
<i>Shapiro v. United States</i> , 335 U. S. 1 (1948).....	22, 28
<i>Sonsinsky v. United States</i> , 300 U. S. 506 at 513.....	18
<i>Story v. Rives</i> (1938), 68 App. D. C. 325, 97 F. 2d 182, cert. denied, 305 U. S. 395.....	29
<i>Twining v. New Jersey</i> , 211 U. S. 78.....	30
<i>United States v. Arnold, Jordan and Wingate</i> No. 478 (D. C. E. D. Va.), September 18, 1952.....	12
<i>United States ex rel. Vaitauer v. Commissioner of Immigration</i> , 273 U. S. 103 at 112 (1927).....	16
<i>United States v. Feldman</i> , 126 F. 2d 394 (C. A. 2).....	30
<i>United States v. Five Gambling Devices</i> , — U. S. — (Nos. 14, 40, and 41) (decided December 7, 1953).....	8, 13
<i>United States v. Forrester</i> , 105 F. Supp. 136 (D. C. N. D. Ga.)....	12
<i>United States v. One Ford Coupe</i> , 272 U. S. 321, 327.....	16
<i>United States v. Kahriger</i> , (D. C. E. D. Pa.), 105 F. Supp. 332..	9
<i>United States v. Kahriger</i> , — F. 2d — (3d Cir., decided February 18, 1954).....	14, 27
<i>United States v. Kahriger</i> , 345 U. S. 22 (decided March 9, 1953) ..	8,
9, 10, 11, 12, 14, 15, 18, 19, 20, 21, 24, 25, 26, 28, 29, 30, 31	
<i>United States v. Monia</i> , 317 U. S. 424 at 427 (1943).....	16, 22
<i>United States v. Murdock</i> , 284 U. S. 141, 149.....	30
<i>United States v. Nadler</i> , 105 F. Supp. 918 (D. C. N. D. Cal.)....	12
<i>United States v. Penn</i> , No. 2021 (D. C. M. D. N. C.), May 1952..	12
<i>United States v. Robinson</i> , 107 F. Supp. 38 (D. C. E. D. Mich.)..	12
<i>United States v. St. Pierre</i> , 128 F. 2d 979, 980 (C. A. 2).....	30
<i>United States v. Sisco</i> , 262 U. S. 165.....	17
<i>United States v. Smith</i> , 106 F. Supp. 9 (D. C. S. D. Cal.).....	12
<i>United States v. Stafoff</i> , 260 U. S. 477, 480.....	16
<i>United States v. Sullivan</i> , 274 U. S. 259.....	16, 17, 18, 29
<i>United States v. White</i> , 322 U. S. 694, 698 (1944).....	22
<i>Wilson v. United States</i> , 221 U. S. 361.....	28

Reports and Law Review Articles:

Application of the Self-Incrimination Clause to the Compulsory Production of Books and Papers Required to be Kept by Statute, 20 Indiana Law Review 567 (1949).....	15
---	----

Reports and Law Review Articles—Continued

Page

Constitutional Law—Excise Taxation—Regulation by Ancillary Provisions, 32 Nebraska Law Review 103 (1952).....	9
Constitutionality of the Federal Gambling Tax, 47 North Western Univ. Law Review 705 (1952).....	9
Final Report of the Special Committee to Investigate Organized Crime in Interstate Commerce, Senate Report No. 725 (1951).....	11
News Release, United States Treasury Department, Bureau of Internal Revenue, Morning News, August 28, 1953.....	11
Taxing and Spending, 23 Cornell Law Quarterly 1 (1937).....	9
The Wagering Tax Act and the Tenth Amendment—Is Morality the Test? 14 Univ. Pittsburgh Law Review 71 (1952).....	9
The Privilege Against Self-Incrimination and Required Income Tax Records, 18 Univ. of Chicago Law Review 687 (1951) and 30 Taxes (The Tax Magazine) 45 (1952).....	15
7 Miami Law Quarterly 252 (1953).....	10
26 Southern California Law Review 203 (1953).....	10
31 North Carolina Law Review 467 (1953).....	10
39 Virginia Law Review 530 (1953).....	10
Miscellaneous:	
Bureau of Internal Revenue Regs. 132, July 16, 1952, Sec. 325.50..	23
District of Columbia Code (1951), § 22-1501 to § 22-1513.....	29
Title 18, U. S. C., § 371.....	2
8 Wigmore (3d Ed., 1940), § 2259 (c).....	20

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12009

FRANK LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA, CRIMINAL DIVISION*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On October 7, 1952, an information was filed against Frank Lewis, the appellant herein, in the Municipal Court for the District of Columbia, Criminal Division, wherein he was charged with having been engaged in the business of accepting and receiving wagers without having paid the Special Occupational Tax as required by law. The information reads, in pertinent part, as follows (J. A. 1-2):

* * * and within the jurisdiction of this Court, Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December 1951, in the District of Columbia, engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars (\$50.00) as imposed by Section 3290 of Internal Revenue Code, he failed to pay said tax, all in violation of Section 3294 (a) Internal Revenue Code: Title 26 U. S. Code Section 3294 (a) and Section 2707 (b) In-

ternal Revenue Code as made applicable by Section 3294 (c) Internal Revenue Code * * *.

Appellant moved, on October 28, 1952, to dismiss the above information, on the following grounds (J. A. 4-5):

1. Chapter 27a of the Revenue Act of 1951, on which the information is based, is unconstitutional in that its provisions impose penalties upon the defendant in the guise of taxes.

2. Chapter 27a of the Revenue Act of 1951, upon which the information is based, contravenes the Fifth Amendment to the United States Constitution because the information required to be given by defendant in conformance with said Chapter compels defendant to be a witness against himself and to incriminate himself.

3. And for other reasons to be brought to the attention of the Court at the time this motion is argued.

After several continuances, the oral hearing on the motion was held in the trial court on May 21, 1953, at which time appellant filed a Memorandum in Support of Motion to Dismiss (J. A. 3). Whereupon, the Government requested permission to file a written opposition thereto, which request was granted and on July 6, 1953, the Government's opposition was filed (J. A. 3). On July 24, 1953, the trial court handed down a written opinion wherein it is held that Chapter 27a of the Internal Revenue Code is unconstitutional because it imposes penalties in the guise of taxes and because it compels a person within the District of Columbia to give information which incriminates him or tends to incriminate him to a violation or violations of Federal law, to wit, Section 1501, 1502, 1503, and 1508 of Title 22 of the District of Columbia Code and also Section 371 of Title 18 of the United States Code (J. A. 5-27).¹ From the order of the trial court dismissing the information against appellant (J. A. 4), the Government appealed to the Municipal Court of Appeals for the District of Columbia (J. A. 28). On November 6, 1953, the Municipal Court of

¹ The trial court expressly declined to rule upon the argument of appellant that the wagering tax act deprives him of the protection afforded him by the Fourth Amendment (J. A. 27).

Appeals handed down an opinion reversing the judgment of the trial court, which opinion reads, in pertinent part, as follows (J. A. 32-34):

In applying this test we note that the wagering tax act here involved has been held valid by a three-judge federal court in this jurisdiction. *Combs v. Snyder*, D. C. D. C., 101 F. Supp. 531, *affirmed without opinion*, 342 U. S. 939. Six other district courts have likewise upheld the constitutionality of the same act. And in the only case in which a district court held the act invalid there resulted a reversal by the Supreme Court. *United States v. Kahriger*, 345 U. S. 22, *rehearing denied*, 345 U. S. 931. There the highest Court held that the act did not prescribe a penalty or require self-incriminating revelations in violations of the fifth amendment.

Discussing the *Kahriger* decision at length in his opinion, the trial judge found the present case distinguishable. He held compliance with the act would involve self-incrimination, because registration is required only after wagers have been accepted. Therefore, he said, since District of Columbia laws make the acceptance of wagers a crime, and since such laws are federal laws, one who registers under the act, giving his name and address, and his employees' names and addresses, would necessarily be giving evidence tending to incriminate himself of a violation of federal law. This position is directly contrary to the Supreme Court's ruling in the *Kahriger* case, where it was said: "Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for. * * * Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. * * * If respondent wishes to take wagers subject to excise taxes under § 3285, *supra*, he must pay an occupational tax and register. Under the registration provisions of

the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

Thus the *Kahriger* opinion construed the act to require registration before entering the business of accepting wagers, and held that such was valid and proper. It was not open to the Municipal Court to adopt a different construction.

The trial court also said: "even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the conspirators applied for a tax stamp such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction." That statement is answered in the words we have already quoted from the *Kahriger* decision to the effect that one who has not registered has no right to claim the constitutional privilege.

The second basis for the decision of the trial court, i. e., that the act imposes a penalty in the guise of a tax, is likewise contrary to the holding in *Kahriger*, which, as we have just said, validates the requirement that registration and payment of the tax are necessary before the named business is entered into.

Various other matters and contingencies are discussed in the opinion below, and urged upon us in appellee's brief here, some by way of speculation and others in form of predictions in terrorem. We consider them to be subordinate to the vital issues we have discussed, and wholly insufficient to support the ruling of unconstitutionality.

From the order of the Municipal Court of Appeals (J. A. 34), appellant now brings this appeal by leave of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States reads, in pertinent part, as follows:

No person * * * shall be compelled in a criminal case to be a witness against himself, * * *.

The provisions of Chapter 27A—Wagering Taxes—of the Internal Revenue Code read, in pertinent part, as follows:

SUBCHAPTER A—TAX ON WAGERS

26 U. S. C. § 3285. *Tax.*

(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions. For the purposes of this chapter—

(1) The term “wager” means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term “lottery” includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distributing of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3627.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

SUBCHAPTER B—OCCUPATIONAL TAX

26 U. S. C. § 3290. *Tax.*

A special tax on \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U. S. C. § 3291. *Registration.*

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplement information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U. S. C. § 3292. *Certain provisions made applicable.*

Sections 3271, 3273 (a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply.

26 U. S. C. § 3293. *Posting.*

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, exhibit it, upon request; to any officer or employee of the Bureau of Internal Revenue.

26 U. S. C. § 3294. *Penalties.*

(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000.

(b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section

3293, shall be liable to a penalty of \$50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of \$100, and the cost of prosecution.

(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

SUBCHAPTER C—MISCELLANEOUS PROVISIONS

26 U. S. C. § 3297. *Applicability of federal and state laws.*

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

26 U. S. C. § 3298. *Inspection of books.*

Notwithstanding section 3621, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

SUMMARY OF ARGUMENT

Appellant contends that the Occupational Tax Act is unconstitutional because it is a penalty in the guise of a tax. However, the Supreme Court has held that such Act is a revenue provision not a penalty, and that the Act is definite and certain, not vague and discriminatory. The Supreme Court has also held that the penalty provisions and the registration requirements of the Act are reasonable and necessary implements to the collection of the tax in issue. *United States v. Kahriger*, 345 U. S. 22; *United States v. Five Gambling Devices*, — U. S. — (decided December 7, 1953); and *Irvine v. California*, — U. S. — (decided February 8, 1954). Therefore, the constitutional question is foreclosed to appellant.

Appellant further contends that the Occupational Tax Act is unconstitutional because, if he registers for the tax stamp under the Act, he will be compelled to give self-incriminatory statements. However, appellant cannot claim the privilege against self-incrimination because he has not registered for the occupational tax. Furthermore, the law is now well settled that such privilege applies only to past acts and not to future acts. Registration for the tax stamp is a condition precedent to the engaging in the gambling business and, therefore, appellant cannot claim the privilege. *United States v. Kahriger, supra.*

ARGUMENT

I. The Wagering Tax Act is not a penalty in the guise of a tax

1. *Similar laws have been declared constitutional.* The trial court in the instant case has held Chapter 27A of the Internal Revenue Code, Title 26 U. S. C., § 3285 et seq., i. e., the Wagering Tax Act, to be a penalty in the guise of a tax (R. 30). A similar ruling was made by the District Court in *United States v. Kahriger* (D. C. E. D. Pa.), 105 F. Supp. 332. The Supreme Court, however, reversed in *United States v. Kahriger*, 345 U. S. 22 (decided March 9, 1953), saying, *inter alia* (345 U. S. at 27):²

Appellee would have us say that, because there is legislative history indicating a congressional motive to suppress wagering, this tax is not a proper exercise of such taxing power. In the *License Tax Cases, supra*, it was admitted that the federal license "discouraged" the activities. The intent to curtail and hinder, as well as tax, was also manifest in the following cases, and in each of them the tax was upheld: *Veazie Bank v. Fenno*, 8

² See also: *Casey v. United States*, 276 U. S. 413 (tax on narcotics); *Alston v. United States*, 274 U. S. 289 (tax on narcotics); *Felsenheld v. United States*, 186 U. S. 126 (tax on tobacco); *In re Kellock*, 165 U. S. 526 (tax on oleomargarine). In general see: *Constitutionality of the Federal Gambling Tax*, 47 Northwestern Univ. Law Review 705 (1952); *The Wagering Tax Act and the Tenth Amendment is Morality the Test?*, 14 Univ. Pittsburgh Law Review 71 (1952); *Constitutional Law—Excise Taxation—Regulation by Ancillary Provisions*, 32 Nebraska Law Review 103 (1952); and *Taxing and Spending*, 23 Cornell Law Quarterly 1 (1937).

Wall. 533 (tax on paper money issued by state banks); *McCray v. United States*, 195 U. S. 27, 59 (tax on colored oleomargarine); *United States v. Doremus*, 249 U. S. 86, and *Nigro v. United States*, 276 U. S. 332 (tax on narcotics); *Sonzinsky v. United States*, 300 U. S. 506 (tax on firearms); *United States v. Senchez*, 340 U. S. 42 (tax on marihuana) (footnote omitted).

Thus, it is now well-settled by repeated decisions that the courts will not look behind an otherwise valid revenue enactment in search of Congressional motivations.

2. ***The Wagering Tax Act is constitutional.*** The decision of the trial court in the instant case that the Wagering Tax Act is a penalty and not a tax is directly contrary to opinion of the Supreme Court in the *Kahriger* case, *supra*. There, the Supreme Court expressly ruled upon the validity and constitutionality of the Wagering Tax Act. The Supreme Court, in upholding the instant law, said *inter alia* (345 U. S. at 28):³

It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible. Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with the above excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid.

It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare, or where, as in dealings with narcotics, the collection of the tax also is difficult. As is well known, the constitutional restraints on taxing are few (footnote omitted). * * *

³ For comments on the *Kahriger* case, *supra*, see: 7 Miami Law Quarterly 252 (1953); 26 Southern California Law Review 203 (1953); 31 North Carolina Law Review 467 (1953); 39 Virginia Law Review 530 (1953).

3. *The Wagering Tax Act produces revenue.* It is now a well-known fact that organized crime in the United States is a multimillion dollar enterprise. See: Final Report of the *Special Committee to Investigate Organized Crime in Interstate Commerce*, Senate Report No. 725 (1951). It is also a well-known fact that gambling activities constitute a principal component part of organized crime. Therefore, a tax measure designed to reach the incomes derived from gambling activities is certain to produce revenue and, indeed, the instant tax has accomplished just that. In *Kahriger*, the Supreme Court pointed out, *inter alia*, that (345 U. S. at 28, n. 4):

One of the indicia which appellee offers to support his contention that the wagering tax is not a proper revenue measure is that the tax amount collected under it was \$4,371,869, as compared with an expected amount of \$400,000,000 a year. The figure of \$4,371,869, however, relatively large when it is compared with the \$3,501 collected under the tax on adulterated and process or renovated butter and filled cheese, the \$914,910 collected under the tax on narcotics, including marihuana and special taxes, and the \$28,911 collected under the tax on firearms, transfer and occupational taxes. (Summary of Internal Revenue Collections, released by Bureau of Internal Revenue, October 3, 1952).

And, the latest report on the amount of revenue collected under the taxes here in issue indicates that during the fiscal year of 1953, \$981,000.00 was collected under the Occupational Tax and \$9,521,000.00 was collected under the Wagering Tax (See: News Release, United States Treasury Department, morning news, August 28, 1953).

4. *The penalty provisions of the Wagering Tax Act aid in the collection of the tax and are valid.* The Supreme Court, in the *Kahriger* case, *supra*, reviewed the penalty provisions of the law here in issue and declared them to be valid. The Supreme Court said, *inter alia* (345 U. S. at 31):

Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject

only to state regulation have caused this Court to declare the enactments invalid. Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power. *All the provisions of this excise are adapted to the collection of a valid tax* (Emphasis added—footnotes omitted).

5. **The registration requirements are necessary.** The Supreme Court, in the *Kahriger*, expressly approved the terms of the form required by the Wagering Tax Act. The Court held, *inter alia* (345 U. S. at 31):⁴

Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of the names, addresses, and places of business. This is quite general in tax returns. Such data are directly and intimately related to the collection of the tax and are "obviously supportable as in aid of a revenue purpose." *Sonzinsky v. United States*, 300 U. S. 506, at 513. The registration provisions make the tax simpler to collect (footnote omitted).

6. **The Wagering Tax Act is Definite and certain.** In addition to holding, as is pointed out herein above, that the Wagering Tax Act is valid as a revenue measure, the Supreme Court held that the same Act is not vague, indefinite or arbitrary. The Supreme Court, in *Kahriger*, said in pertinent part (345 U. S. at 33):⁵

Finally, we consider respondent's contention that the order of dismissal was correct because a conviction under the sections in question would violate the Due Process Clause because the classification is arbitrary and the

⁴ See also: *Combs v. Snyder*, (1951) (D. C. D. C.), 101 F. Supp. 531, affirmed, 342 U. S. 939 (1952).

⁵ It is to be noted that in reversing the District Court in *United States v. Kahriger*, *supra*, the Supreme Court cited the following cases in the Wagering Tax Act with approval (345 U. S. at 25, n. 2): *United States v. Smith*, 106 F. Supp. 9 (D. C. S. D. Cal.); *United States v. Nadler*, 105 F. Supp. 918 (D. C. N. D. Cal.); *United States v. Forrester*, 105 F. Supp. 136 (D. C. N. D. Ga.); *United States v. Robinson*, 107 F. Supp. 38 (D. C. E. D. Mich.); *United States v. Arnold, Jordan, and Wingate*, No. 478 (D. C. E. D. Va.), September 18, 1952. *United States v. Penn*, No. 2021 (D. C. M. D. N. C.), May 1952. *Combs v. Snyder*, *supra*.

statutory definitions are vague. The applicable definitions are 26 U. S. C. (Supp. V) § 3285 (b), (d) and (3). The arbitrariness is said to arise from discrimination because some wagering activities are excluded. The Constitution does not require that a tax statute cover all phases of a taxed or licensed business. Respondent predicates vagueness of the statute upon the use, in defining the subject of the tax, of the description "engaged in the business" of wagering and "usually" in § 3285 (b) (2). We have no doubt the definitions make clear the activities covered and excluded (footnotes omitted).

7. The Supreme Court has followed *Kahriger* in subsequent cases. In *United States v. Five Gambling Devices*, — U. S. — (Nos. 14, 40 and 41) (Decided December 7, 1953), wherein the Supreme Court said, *inter alia* (Slip opinion at pages 6-7, n. 10):

Of course, decisions upholding legislation requiring information in aid of the taxing power afford no support here, because the taxing power penetrates and permeates every activity, intrastate or interstate, within the nation. (Citing: *United States v. Doremus*, 249 U. S. 86; *Nigro v. United States*, 276 U. S. 332; *Sonzinsky v. United States*, 300 U. S. 506; and *United States v. Kahriger*, 345 U. S. 22.)

And in *Irvine v. California*, — U. S. — (No. 12) (Decided February 8, 1954), the Supreme Court held, *inter alia* (Slip opinion at page 2):

Upon his arrest, petitioner had on his person a federal wagering tax stamp bearing his name, home address, and the date, November 5, 1951. Against objection, it and other documentary evidence from the office of the United States Collector of Internal Revenue was received to show petitioner's application for the wagering tax stamp and his return to the Collector under the federal law. *These documents were made pursuant to the Federal Act imposing wagering taxes*, 65 Stat. 529, 26 U. S. C. (Supp. V) § 3285 *et seq.*, held constitutional by this

Court in United States v. Kahriger, 345 U. S. 22. The claim is made that it was error as a matter of federal law to admit this evidence and also that payment of the federal tax resulted in a federal license to conduct the wagering business. This statute does not make such records or stamps confidential or privileged but, on the contrary, expressly requires the name and place of business of each such taxpayer to be made public. 53 Stat. 395, 26 U. S. C. § 3275. Petitioner's contentions are without substance or merit in view of the express provision of the statute that payment of the tax does not exempt any person from penalty or punishment by state law and does not authorize commencement or continuance of such business. 53 Stat. 395, 26 U. S. C. § 3276; 65 Stat. 531, 26 U. S. C. (Supp. V) § 3292 (Footnote omitted. Emphasis added).

And see: *United States v. Kahriger*, — F. 2d — (3rd Cir.) (Decided February 18, 1954), involving the appeal from the judgment of conviction in the trial which followed the decision of the Supreme Court in the first *Kahriger* appeal. The Third Circuit said, *inter alia* (Slip opinion at p. 2):

Kahriger makes several contentions. He asserts that the application of the statute to him by means of Form 11-C, the "Special Tax Return and Application for Registering—Wagering," is unconstitutional, saying that the registration requirements would require him to incriminate himself despite the prohibition of the Fifth Amendment. The short answer to this contention is that Form 11-C precisely follows the terms of the statute and, since the latter has been held constitutional by the Supreme Court, the constitutional question raised by Kahriger is no longer open to us (footnote omitted).

Chief Judge Biggs then went on, however, to reverse the trial court, saying, in pertinent part (Slip opinion at p. 5):

An additional point, however, is urged by Kahriger, viz, that the evidence does not sustain the charge of a willful failure to register and a willful failure to pay the occupational tax. On this ground we find it necessary

to reverse the judgments of conviction and to direct the court below to enter judgments of acquittal on both counts

See also: *Mosely v. United States*, 207 F. 2d 908 (5th Cir. 1953).

Thus, it is clear that the revenue act herein in issue is constitutional and that it is not a penalty in the guise of a tax. The Supreme Court, in the *Kahriger* case, *supra*, has held: (1) that the Wagering Tax Act is a revenue act and not a penalty; (2) that similar revenue acts have been declared valid and constitutional; (3) that the Wagering Tax Act produces substantial revenue; (4) that the penalty provisions of the Wagering Tax Act aid in the collection of a valid tax; (5) that the registration requirements of the Wagering Tax Act are necessary implements to the collection of the valid tax; and (6) that the Wagering Tax Act is definite and certain and is not arbitrary. Therefore, the judgment of the Municipal Court of Appeals should be affirmed (J. A. 34).

II. Appellant cannot claim the privilege against self-incrimination because he has not registered for the tax

Appellant admits that he has not paid the wagering tax and the failure to pay such tax constitutes the crime with which he is charged. He contends that the trial court correctly dismissed the information on the basis of the privilege against self-incrimination. However, the law is now settled that such privilege cannot be raised by one who has not registered for the applicable tax.

In the *Kahriger* case, *supra*, the Supreme Court specifically held that the privilege against self-incrimination cannot be raised by one who has not registered for the Occupational Tax. The Court said, *inter alia* (345 U. S. at 32):⁶

Appellee's second assertion is that the wagering tax is unconstitutional because it is a denial of the privilege against self-incrimination as guaranteed by the Fifth Amendment.

⁶ See: *The Privilege Against Self-Incrimination and Required Income Tax Records*, 12 *Univ. of Chicago Law Review* 687 (1951) and 30 *Taxes* (The Tax Magazine) 45 (1952); and *Application of the Self-Incrimination Clause to the Compulsory Production of Books and Papers required to be Kept by Statute*, 20 *Indiana Law Review* 567 (1949).

Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for.

And, in order that such statement may be clearly understood, the Supreme Court added, *inter alia* (345 U. S. at 32):

In *United States v. Sullivan*, 274 U. S. 259, defendant was convicted of refusing to file an income tax return. It was assumed that his income "was derived from business in violation of the National Prohibition Act." *Id.*, at 263. "As the defendant's income was taxed, the statute of course required a return. See *United States v. Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. *If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.*" 274 U. S. at 263. [Emphasis added.]

This reasoning is in complete accord with the general principles enunciated by the Supreme Court in prior decisions to the effect that the privilege against self-incrimination is a personal privilege which is deemed to be waived unless it is invoked. See *Rogers v. United States*, 340 U. S. 367 at 370-371 (1951); *United States v. Monia*, 317 U. S. 424 at 427 (1943); and *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U. S. 103 at 112 (1927). And, in *United States v. Sullivan*, 274 U. S. 259, these same principles were directly applied to matters of federal taxation.

There, Sullivan claimed that he should not be compelled to file an income tax return because the facts to be stated therein might incriminate him under *federal* law. The Supreme Court, speaking through Mr. Justice Holmes, said, *inter alia* (274 U. S. at 262-263):⁷

⁷ See also: *United States v. One Ford Coupe*, 272 U. S. 321, 327; and *United States v. Stafoff*, 260 U. S. 277, 480, wherein it is held that Congress has the authority to impose taxes on occupations illegal under *federal*

We may take it that the defendant had sufficient gross income to require a return under the statute unless he was exonerated by the fact that the whole or a large part of it was derived from business in violation of the National Prohibition Act.

Then, in *Sullivan*, the Court proceeded to declare the doctrine that a return must be filed before the privilege against self-incrimination can be raised (274 U. S. at 263-264):

As the defendant's income was taxed, the statute of course required a return. See *United States v. Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of the opinion that the protection of the Fifth Amendment was pressed too far. *If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refused to make any return at all.* We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. *But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon.* [Emphasis added.]

And, in closing, the Court said (274 U. S. at 264):

* * * He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. *Mason v. United States*, 244 U. S. 362. *United States ex. rel. Vajtauer v. Commissioner of Immigration*, 273 U. S. 103. In this case the

law and that persons engaged in selling liquor during the period of national prohibition were still required to pay the federal taxes on the forbidden traffic.

defendant did not even make a declaration, he simply abstained from making a return. * * *

Therefore, the *Sullivan* case stands for the proposition that a taxpayer cannot claim the privilege against self-incrimination unless he has filed a return. The Supreme Court held this to be true even though the taxpayer shows a possible jeopardy under *federal* law because it cannot dispute that the National Prohibition Act was a federal law. And, what is perhaps more important, the possible jeopardy under federal law in the *Sullivan* case involved *past* criminal activities and, as will be discussed hereinafter, the privilege against self-incrimination only applies to past acts and not to future acts. Nevertheless, the Supreme Court, in *Sullivan*, expressly holds that in order to claim the privilege, a taxpayer must file a return and such legal doctrine is approved, adopted and applied to the Occupational Stamp Tax in the *Kahriger* case, *supra*.

Furthermore, appellee cannot object to the registration form required by the Wagering Tax Act. This is now clear, for the Supreme Court said in *Kahriger*, as is pointed out herein above (345 U. S. at 31-32):⁸

Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business. This is quite general in tax returns. Such data are directly and intimately related to the collection of the tax and are "obviously supportable as in aid of a revenue purpose." *Sonzinsky v. United States*, 300 U. S. 506 at 513. The registration provisions made the tax simpler to collect (footnote omitted).

In addition, the registration form was directly in issue in *Combs v. Snyder* (1951) (D. C. D. C.), 101 F. Supp. 531, *affirmed*, 342 U. S. 939 (1952). There, Combs brought an action before a statutory three-judge court in this jurisdiction, maintaining that he was entitled to a stamp even though he did not supply all of the required information on the return. It is interesting to note that the basic argument put forth in the *Combs* case was self-incrimination under *federal* law. In

⁸ See also: *Irvine v. California*, *supra*.

addition, Combs raised his objections in the return. However, the three-judge court held the wagering tax law to be constitutional and that Combs was not entitled to a stamp until he furnished the necessary data. The Supreme Court affirmed (343 U. S. 939) and the decision is cited with approval in *Kahriger* (345 U. S. at 25 n. 2). Hence, it is now clear that the privilege against self-incrimination cannot be claimed unless and until registration under the wagering tax law has been made and, further, that the form involved in such law is unobjectionable.

As a practical matter, the holdings of the Supreme Court rest on firm ground. The privilege against self-incrimination cannot be raised in a vacuum. There must be some action taken and, in tax matters, such action involves the filing of a required tax form. Appellant has not filed the necessary form and, of course, has entered no objections at the time of filing. Thus, under the rulings of the Supreme Court in the *Kahriger* case, *supra*, the *Sullivan* case, *supra*, and the *Combs* case, *supra*, he is without standing to claim the privilege against self-incrimination in the instant case. Therefore, the action of the trial court in dismissing the information filed against appellant was clearly erroneous and the judgment of the Municipal Court of Appeals should be affirmed (J. A. 33).

III. The occupational tax is a condition precedent to doing business and, therefore, the privilege against self-incrimination cannot be raised because such privilege only applies to past acts

Even if it is assumed, *arguendo*, that appellant can claim the privilege against self-incrimination without filing a wagering tax return, the judgment of the Municipal Court of Appeals is not to be disturbed, because the law is now well settled that such privilege applies only to past acts and not to future acts. The Supreme Court made this manifestly clear in the *Kahriger* case. There, the Supreme Court decided the same issue as is here presented by holding, as is pointed out herein above, that a taxpayer must file a return in order to claim the privilege. However, the Court went on to say (345 U. S. at 32):

Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. 8 Wigmore (3d ed., 1940) § 2259 (c).

And, the import and strength of this crucial statement is emphasized by the next-following statement (345 U. S. at 32):

* * * If respondent wishes to take wagers subject to excise taxes under § 3285, *supra*, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, *appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions* (footnote omitted. Emphasis added). * * *

Thus, the Supreme Court held in *Kahriger* that a taxpayer such as appellant cannot claim the privilege if he has not registered for the tax in issue and the Court further held, after assuming for the sake of argument that registration was not a prerequisite, that the Occupational Tax only pertains to future acts. It follows, therefore, that the Supreme Court held that the privilege cannot be raised by *any* taxpayer who questions the validity of the Occupational Tax.

That the Supreme Court considers the proposition that the privilege against self-incrimination applies only to past acts is evidenced by the fact that the opinion in *Kahriger* cites no authority but the treatise by Professor Wigmore (345 U. S. at 32). The soundness of such single citation is revealed by the following language (8 Wigmore (3d ed., 1940) § 2259 (c)):

Crime disclosed in (1) Public Books, or (2) Books Required to be Kept. * * *

But there is even more cogent reason for reaching this conclusion: The State requires the books to be kept but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The State announced its requirement to keep the books long before there was any crime; not that the entry was made by

reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence, the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it.

2. The same reasoning applies to *records required by law to be kept* by a citizen not being a public officer, e. g., a druggist's report of liquor sales, or a pawnbroker's records of pledges. The only difference here is that duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty, or compulsion, is directed as before to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. The object of such statutory measures is primarily to assist in the public administration (footnotes omitted). * * *

Thereupon, Professor Wigmore makes this conclusion, which conclusion has definite applicability in the instant case:

The generalization, therefore, may be made that *there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which is a particular one which may or may not in future be criminal at the choice of the party reporting.* [Emphasis in the text.]

Such records therefore are not protected by the present privilege against self-incrimination.

These propositions make it clear that the privilege against self-incrimination has no pertinency in the instant case. Furthermore, the Supreme Court explained in *Kahriger* exactly what is meant by past acts, as opposed to *future* acts, insofar as the Occupational Tax is concerned. As is pointed out herein above, the Court explicitly stated that a taxpayer is not compelled to confess to acts already committed when he registers for the Occupational Tax. Rather, the taxpayer is merely informed by the statute that he must fulfill certain conditions

before he can engage in the business of wagering in the future. 345 U. S. at 32-33.

Thus, the Supreme Court has noted the absence of one of the basic essentials of the privilege against self-incrimination, namely, compulsion. There is no compulsion or coercion involved in the Occupational Tax. No one, including appellant, is required to register for a tax stamp and no compulsion is exerted upon appellant to do so. His is the free choice and free will. The Government does not compel appellant to gamble or to engage in the gambling business. He can choose to register, in which case he must supply the required information, or he elects to refrain from engaging in the business upon which Congress has seen fit to impose a tax. Hence, there can be no self-incrimination. See: *Davis v. United States*, 328 U. S. 582, 590 (1946); *Shapiro v. United States*, 335 U. S. 1 (1948); *United States v. Monia*, 317 U. S. 424; and *E. Fougere & Co. v. City of New York*, 224 N. Y. 269, 120 N. E. 642.⁹

1. ***The Occupational Tax applies only to future acts.*** Appellant contends that the Occupational Tax does not concern *in futuro* acts because there appears to be a link between Subchapter B (The Occupational Tax) and Subchapter A (The Wagering Tax). Such contention not only flies in the face of the opinion of the Supreme Court in *Kahriger*, but it also contravenes the provisions of the enactments involved.

Subchapter A (Title 26 U. S. C. § 3285 (d)) provides:

Persons Liable for Tax.

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *

Subchapter B (Title 26 U. S. C. § 3290) provides:

A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who

⁹ It is to be noted that *Hoffman v. United States*, 341 U. S. 479 at 490 (1951), which is cited by appellant (Br., p. 25), contains the following pertinent quotation: "The immediate and potential evils of *compulsory* self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime" (citing *United States v. White*, 322 U. S. 694, 698 (1944)). [Emphasis added.]

is engaged in receiving wagers for or on behalf of any person so liable.

Any apparent link between Subchapter A and Subchapter B is removed completely by the following section in Subchapter B (The Occupational Tax);¹⁰ Title 26 U. S. C. § 3294:

(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under *this subchapter*, without having paid such tax, shall, besides being liable to payment of the tax, be fined not less than \$1,000 and not more than \$5,000. [Emphasis added.]

Therefore, the Wagering Tax Act provides, in explicit terms, that registration for the occupational stamp must precede those activities upon which the Wagering Tax is imposed. And, any questions, if any, as to the construction of the Act here in issue were dispelled by the Supreme Court in the *Kahriger* case. For, as is pointed out hereinabove, the Court said (345 U. S. at 32):

* * * If respondent wishes to take wagers subject to excise taxes under § 3285, *supra*, he must pay an occupational tax and register. * * *

Support for this proposition is to be found in the fact that Section 3270, Title 26, U. S. C., is not incorporated into the provisions of the Occupational Tax statute. The provisions of Section 3270 read in pertinent part as follows:

Subchapter B—General provisions:

§ 3270. *Registration.*

(a) *Requirements.* Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same, and the places of residence, shall be so registered.

¹⁰ See also Bureau of Internal Revenue Regulations 132, July 16, 1952, Section 325.50.

The reason that Section 3270 was not incorporated into the Wagering Tax Act is clear. Such Act has its own registration provisions (Section 3291, Title 26 U. S. C.), which provisions were declared necessary implements to the enforcement of the Act by the Supreme Court in *Kahriger* (345 U. S. at 31). However, certain other statutory provisions were expressly incorporated into the Occupational Tax by Section 3292, Title 26 U. S. C., which reads as follows:

Certain provisions made applicable.

Sections 3271, 3273 (a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by *this subchapter* and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under *this subchapter* shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply. [Emphasis added.]

For the purposes of the instant case, the incorporation of Section 3273 (a) (Stamp Supply); Section 3275 (List of special taxpayers for public inspection); Section 3276 (Application of state laws); Section 3277 (Liability of partners); Section 3279 (Liability in case of different businesses of same ownership and location); and Section 3280 (Liability in case of death or change of location) into the Occupational Tax is of no consequence. However, the incorporation of Section 3271, Title 26 U. S. C., into the Act here in issue is another manifestation of the intent of Congress to compel registration prior to the conducting of the gambling activities upon which the tax is imposed. The pertinent terms of Section 3271 read as follows:

Payment of tax.

(a) *Condition precedent to doing business.* No person shall be engaged in or carry on any trade or business mentioned in this chapter *until* he has paid a special tax therefor in the manner provided in this chapter. [Emphasis added.]

Thus, it is readily apparent that petitioner cannot claim the privilege against self-incrimination, and that the opinion

of the Municipal Court of Appeals is correct. Such privilege applies only to past acts and not to future acts and, even if it is assumed, *arguendo*, that one who has not registered for the tax can raise the issue of the privilege, the very terms of the law in issue show that the issue so raised is without foundation or merit.

2. Subchapter A is not in issue. In his Fifth Amendment argument (Br. at pp. 17-30), appellant makes meagre reference to the *Kahriger* case, which case involved the very Occupational Tax here in issue. Rather, he pitches his case upon the alleged unconstitutionality of the Wagering Tax Act (26 U. S. C. §§ 3285-3287), which Act is not in issue.

What appellant seeks is an interpretation by this Court to the effect that Subchapter B is unconstitutional because there is some question as to constitutionality of Subchapter A. However, appellant is not charged with violating the provisions of Subchapter A, that is, he is not charged with having failed to pay the 10% tax upon the wagers which he has received. Rather, he is charged with having engaged in the business of accepting wagers without having first paid the \$50.00 Occupational Tax. Thus, his argument is hypothetical and immaterial.

Assuming, however, that his argument deserves consideration, it is clearly without merit. Section 3290 states that:

A special tax of \$50 per year shall be paid by each person who is liable for the tax under subchapter A *or* who is engaged in receiving wagers for or on behalf of any person so liable. [Emphasis added.]

This section is one of definition and not of art. The use of the coordinating particle "or" shows that Congress merely intended to define who shall pay the amount specified. Congress did not intend, as appellant would have us believe, that the \$50 shall be paid by those who are *already* engaged in the business of gambling. For, as is demonstrated hereinabove, liability attaches under Section 3294 when a person engages in the business of gambling "without" having paid the Occupational Tax; and Section 3271 expressly provides that no person shall engage in the business of gambling "until" he has paid the Occupational Tax.

3. Appellant cannot claim the privilege against self-incrimination as to a possible conspiracy. In the first place, appellant has not registered for the Occupational Tax. He cannot claim the privilege against self-incrimination unless and until he does so. Therefore, the following statement in *Kahriger* applies with equal force to gambling activities or to conspiracies to commit gambling activities (345 U. S. at 32):

* * * Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for.

And, in the second place, the privilege against self-incrimination is a personal privilege which is exclusively for a witness compelled to testify against himself in a criminal case. Therefore, appellant cannot claim such privilege on behalf of any other person, albeit a co-conspirator. *Rogers v. United States*, 340 U. S. 367 at 371; *McAlister v. Henkel*, 201 U. S. 90; and *Hale v. Henkel*, 201 U. S. 43.

4. Appellant cannot raise the Fourth Amendment. It is contended by appellant (Br. at pp. 30-31), that if he registers and posts the return that his constitutional rights will be violated. However, he has not registered and he has not posted the return. He is, therefore, quite unlike Mr. Irvine who did so register. The Supreme Court pointed out with respect to such individual that (*Irvine v. California, supra*, Slip opinion at p. 2):

Upon his arrest, petitioner had on his person a federal wagering tax stamp bearing his name, home address and the date, November 5, 1951. Against objection, it and other documentary evidence from the office of the United States Collector of Internal Revenue was received to show petitioner's application for the wagering tax stamp and his return to the Collector under the federal law. These documents were made pursuant to the Federal Act imposing wagering taxes, 65 Stat. 529, 26 U. S. C. (Supp. V) § 3285 *et seq.*, held constitutional by this Court in *United States v. Kahriger*, 345 U. S. 22.

The Supreme Court then went on to show that such evidence was admissible, saying:

The claim is made that it was error as a matter of federal law to admit this evidence and also that payment of the federal tax resulted in a federal license to conduct the wagering business. This statute does not make such records or stamps confidential or privileged but, on the contrary, expressly requires the name and place of business of each such taxpayer to be made public. 53 Stat. 395, 26 U. S. C. § 3275.¹¹

And, the Supreme Court continued:

Petitioner's contentions are without substance or merit in view of the express provision of the statute that payment of the tax does not exempt any person from penalty or punishment by state law and does not authorize commencement or continuance of such business. 53 Stat. 395, 26 U. S. C. § 3276; 65 Stat. 531, 26 U. S. C. (Supp. V), § 3292 (footnote omitted).

Hence, it is clear that appellant would have no standing to complain about posting his stamp pursuant to 26 U. S. C. § 3293, if he were to register under the Occupational Tax Act. Furthermore, the *Irvine* case is certain authority for the admissibility into evidence of the stamp and the application for such stamp at a trial involving the particular gambling activities involved. Hence, appellant's objections to the future use of his registration stamp could only be raised at the trial on questions of proof. *United States v. Kahriger* (3d Cir.), *supra*.

5. *The privilege has no application to information required to be filed in connection with the collection of taxes.* A tax return is the statement of account between the taxpayer and his Government. It is impressed with a public interest and constitutes a public document. A tax return which is reasonably adapted to the enforcement of a tax is a record required by law to be kept, and is no more protected by the privilege against self-incrimination than the records required to be kept

¹¹ Section 3275 is expressly incorporated into the Occupational Tax Act in 26 U. S. C. § 3292.

for regulatory purposes in *Shapiro v. United States*, 335 U. S. 1. This must be at least so when the required report or return does not call for information which is incriminating on its face.

As long ago as *Boyd v. United States*, 116 U. S. 616, the Supreme Court indicated that records required to be kept for inspection under revenue laws were not protected by the Fourth Amendment, and presumably also not by the Fifth. See 116 U. S. at 623-624. This principle was applied to other records required to be kept by regulatory statutes in *Wilson v. United States*, 221 U. S. 361, *Davis v. United States*, 328 U. S. 582, and most recently in *Shapiro v. United States*, *supra*. There, the Court held that a licensee under O. P. A. price regulations could be compelled to disclose records which the O. P. A. required him to keep, even though such records might tend to incriminate him of violating the price control law. The opinion stated, *inter alia* (335 U. S. at 32-33):

Accordingly, the principle enunciated in the *Wilson* case, and reaffirmed as recently as the *Davis* case, is clearly applicable here; namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation and the enforcement of restrictions validly established.

In the *Shapiro*, case, the basic activity was prescribing commodity prices in a war emergency. It was not questioned that Congress had power to undertake such regulation, nor that the record-keeping requirement of the Price Control Act was a legitimate exercise of that power. In the instant case, the taxing power of Congress is involved and, in the *Kahriger* case, the Supreme Court has upheld the power of Congress to enact the Wagering Tax Act.

It would be inconsistent with the tenor of the *Shapiro* and *Wilson* cases, *supra*, to permit the Fifth Amendment to excuse one from transmitting information "directly and intimately related to the collection of the tax." See 345 U. S. 31-32. That these doctrines are applicable to income tax returns was indi-

cated, although not decided, in the unanimous opinion in *Sullivan v. United States*, *supra*, wherein the Court stated (274 U. S. 263-264):

It would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.

It would seem to be equally extravagant to permit the Fifth Amendment to prohibit enforcement of a different, but equally valid, federal tax.

6. *The distinction between federal law and state law is immaterial in the instant case.* For the purpose of the instant case, the Government concedes that the criminal laws enacted by the Congress of the United States with respect to criminal activities within the District of Columbia are federal laws. See: *Arnstein v. United States* (1924), 54 App. D. C. 199, 296 Fed. 946, *cert. denied*, 264 U. S. 595; and *Story v. Rives* (1938), 68 App. D. C. 325, 97 F. 2d 182, *cert. denied*, 305 U. S. 395. The Government also concedes that certain gambling activities are prohibited within the District of Columbia by Congressional enactment. See: District of Columbia Code (1951), § 22-1501 to § 22-1513. However, as is pointed out herein above, these concessions are immaterial.

Appellant makes much of the fact that the Government's position in the *Kahriger* case concerned certain state laws and several passages from the Government's briefs in that case are quoted in the lower court's opinion (Br. pp. 16-17, 21-22). No other reason for such arguments on behalf of the Government in *Kahriger* need be given here other than to point out that state law was then before the Supreme Court. The important things to be noted now are the opinion of the Supreme Court in *Kahriger* and the fact that the reasoning and conclusions of such opinion are applicable to the instant case even though the laws of the District of Columbia are involved. Furthermore, the use of quotations from the Government's briefs in *Kahriger* by appellant in the instant case demonstrates the basic and fundamental weaknesses of his position. The law is now well settled that privilege against self-incrimination does not

surmount the bounds of sovereignty and that the possibility of incrimination under state law cannot be the basis for claiming the privilege in a federal case. See: *Feldman v. United States*, 322 U. S. 487, 491-492; *United States v. Murdock*, 284 U. S. 141, 149; *Twining v. New Jersey*, 211 U. S. 78; *Hale v. Henkle*, 201 U. S. 43, 68; *Jack v. Kansas*, 199 U. S. 372; *Brown v. Walker*, 161 U. S. 591, 606; *Counselman v. Hitchcock*, 142 U. S. 547; *Barron v. Baltimore*, 7 Pet. 243. And see: *United States v. St. Pierre*, 128 F. 2d 979, 980 (C. A. 2); *Cararota v. United States*, 111 F. 2d 243 (C. A. 3), *cert. denied*, 311 U. S. 651; *Miller v. United States*, 95 F. 2d 492 (C. A. 9); *Graham v. United States*, 99 F. 2d 746 (C. A. 9); and *United States v. Feldman*, 136 F. 2d 394 (C. A. 2).

The persuasive scope and reasoning of these and other cases were before the Supreme Court in the *Kahriger* case. (See Government's Reply Brief, pp. 6-13.) However, the Court *rejected* such argument and decided the issues before it in *Kahriger* on the sole ground that is set out herein above, namely, that the privilege against self-incrimination cannot be claimed by one who has not registered for the Occupational Tax. The Court further held that such privilege applies only to past acts and not to future acts. Hence, what was argued by the Government in *Kahriger* is important only to show that the opinion in that case applies with crushing effect upon appellant's position. It is clear, therefore, that the opinion and judgment of the Municipal Court of Appeals should be affirmed.

It should be noted that in the *Irvine* case, *supra*, the Supreme Court stated, *inter alia* (Slip opinion at p. 2):

Petitioner's contentions are without substance or merit in view of the express provision of the statute that payment of the tax does not exempt any person from penalty or punishment by state law * * *.

Section 3297 of the Occupational Tax Act reads as follows:

Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the *United States*

or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes. [Emphasis added.]

Thus, what the Supreme Court said in *Irvine* with regard to prosecutions by a particular State applies with equal force and effect in prosecutions by the United States, to wit, the District of Columbia. Hence, appellant's contentions are without merit.

CONCLUSION

As is pointed out herein above, the law is now settled (1) that the Wagering Tax Act is valid and constitutional; (2) that the Wagering Tax Act is not a penalty in the guise of a tax; (3) that similar laws have also been declared valid; (4) that the Wagering Tax Act produces substantial revenue; and (5) that the penalty provisions and the registration requirements of the Wagering Tax Act are reasonable and necessary aids in the collection of a valid tax.

Likewise, the law is now settled (1) that one who has not registered for the Occupational Tax cannot claim the privilege against self-incrimination; (2) that such privilege, in any event, only applies to past acts and not to future acts; (3) that one who registers for the Occupational Tax is not compelled to disclose past acts but only to inform the tax authorities that he will, in the future, engage in business of wagering; and (4) that the privilege against self-incrimination does not apply to records required to be kept by law.

Appellant seeks in the instant case to have this Court depart from these announced and accepted principles of law. More than that, he seeks, as an unregistered taxpayer, to have this Court, on the basis of assumed facts and hypothetical arguments, overrule and reverse the opinion of the Supreme Court in *United States v. Kahriger, supra*; *Combs v. Snyder, supra*; and *Irvine v. California, supra*. Specifically, he asks this Court to reverse the opinion of the lower appellate court, which opinion adheres to the doctrines laid down by the Supreme Court. However, his arguments do not support his request.

Wherefore, it is respectfully submitted that the opinion and judgment of the Municipal Court of Appeals be affirmed.

LEO A. ROVER,
United States Attorney.

KENNETH D. WOOD,
ALEXANDER L. STEVAS,
LEWIS A. CARROLL,
Assistant United States Attorneys.

REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 12,009
—

FRANK LEWIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

—

Appeal from the Judgment of the Municipal Court of Appeals
for the District of Columbia

—

WALTER E. GALLAGHER,
821 Fifteenth Street, N. W.,
Washington 5, D. C.

MYRON G. EHRLICH,
Columbian Building
Washington, D. C.,
Counsel for Appellant.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

MAR 22 1954

Joseph W. Stewart
CLERK

INDEX

	Page
Argument	3
I. The Wagering Tax Act Imposes Penalties in the Guise of Taxes	3
1. No similar laws have been declared constitu- tional	3
2. The taxes collected pursuant to the Wagering Tax Act do not constitute "revenue"	3
3. The registration requirements are unconstitu- tional as applied in the District of Columbia	5
4. The Wagering Tax Act is definite and certain	6
5. The Supreme Court has followed Kahriger only in the application of Federal laws as ap- plied to the states	6
II. Appellant's Failure to Register Does Not Ne- gate His Right to Claim the Privilege Against Self Incrimination	7
III. The Occupational Tax Is Not a Condition Prec- edent to Accepting Wagers in the District of Columbia	9
1. The Occupational Tax imposed by Subchap- ter B of the Wagering Tax Act applies only after the acceptance of a wager	13
2. Subchapter A is in issue	16
3. Appellant can properly claim the privilege against self incrimination as a possible con- spiracy	16
4. Appellant properly raises the Fourth Amend- ment	17
5. The distinction between federal law and state law is controlling in the instant case	21
Conclusion	22

CASES	Page
Child Labor Tax Case, 259 U. S. 20	5, 11
Combs v. Snyder, D.C.D.C., 101 F. Supp. 531, affirmed without opinion, 342 U. S. 939	9, 22
Davis v. United States, 328 U. S. 582, 590 (1946)	11
E. Fougera & Co. v. City of New York, 224 N. Y. 269, 120 N. E. 642	11, 12
Helwig v. United States, 188 U. S. 605, 613	11
Hoffman v. United States, 71 S. Ct. 814, 818	20
Irvine v. California, 74 S. Ct. 381	6, 7, 18, 19, 22
Lipke v. Lederer, 259 U. S. 557, 562	11
O'Sullivan v. Felix, 233 U. S. 318, 324	12
Shapiro v. United States, 335 U. S. 1 (1948)	11
Sonsinsky v. United States, 300 U. S. 506	5
United States v. Five Gambling Devices, et al., 74 S. Ct. 190, 196	6
United States v. Kahriger, 73 S. Ct. 519, 345 U. S. 22	2, 5, 6, 7, 9, 21, 22
United States v. La Franca, 282 U. S. 568, 572	8
United States v. Lewis, Joint Appendix, pp. 11-12	8, 17
United States v. Monia, 317 U. S. 424	11
United States v. One Ford Coupe, 272 U. S. 321	8
United States v. Stafoff, 260 U. S. 477	8
United States v. Sullivan, 274 U. S. 259	8
United States v. Yuginovich, 256 U. S. 450, 464	8

STATUTES AND REGULATIONS

Act of October 20, 1951, c. 521, Title IV, § 471(a), 65 Stat. 529. Title 27, U.S.C. §§ 3285 et seq., Chap. 27A Internal Revenue Code. (Wagering Tax Act)	2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16, 18, 22
Title 18, U.S.C., Section 371	19
Title 18, U.S.C., Section 1301	19
Title 18, U.S.C., Section 1302	19
Title 26, U.S.C., Section 3270	14
Title 26, U.S.C., Section 3271	14, 15
Title 26, U.S.C., Section 3275	17, 18
Title 26, U.S.C., Section 3285	16
Title 26, U.S.C., Section 3287	16
Title 26, U.S.C., Section 3290	19
Title 26, U.S.C., Section 3293	17, 18
Title 26, U.S.C., Section 3294	14
Title 26, U.S.C., Section 3297	7, 22

Index Continued

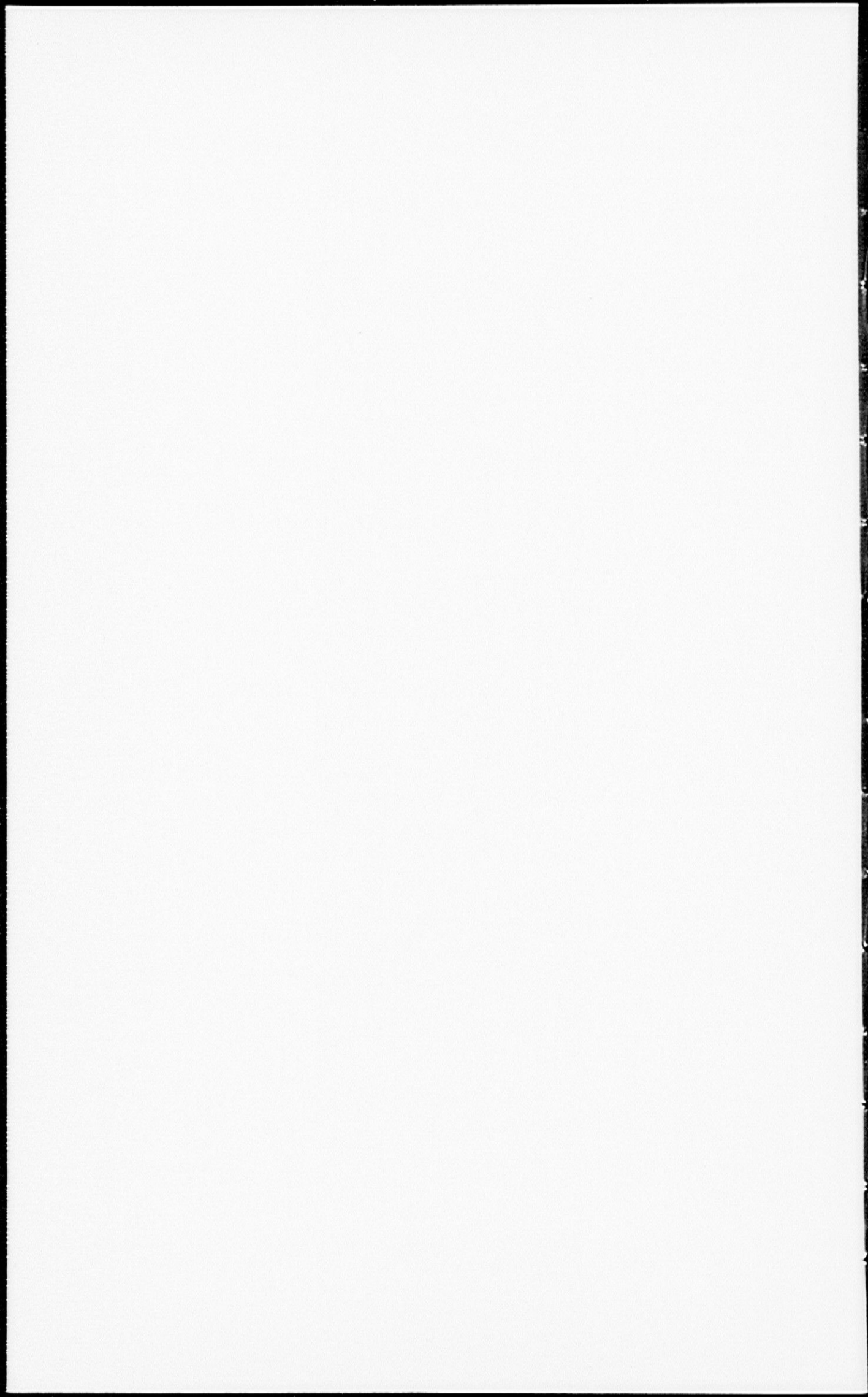
iii

Page

Act of October 28, 1919, c. 85, Sec. 1 et seq., 41 Stat. 305.	
"National Prohibition Act"	8
Fourth Amendment of the Constitution of the United States	17, 18
Fifth Amendment of the Constitution of the United States	5, 20, 22
Treasury Regulations 132, Section 325.42	15
Treasury Decision 4929, Section 463C.32	19
Treasury Decision 4929, Section 463C.33	19
Treasury Decision 4929, Section 463C.34	19
Treasury Decision 5138, Section 458.611	19

MISCELLANEOUS

House Report 586, 82d Cong., 1st Sess., p. 60	13, 14
Senate Report 781, 82d Cong., 1st Sess., p. 118	13, 14
Volstead Act, 41 Stat. 305	8



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,009

FRANK LEWIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the Judgment of the Municipal Court of Appeals
for the District of Columbia

REPLY BRIEF FOR THE APPELLANT

The first question presented by the appellee in its brief is "Is not the question of the constitutionality of the Occupational Tax as a penalty in the guise of a tax, foreclosed to appellant, The Supreme Court having decided that such Act is a revenue measure?"

To this question the appellant answers "No", because the posture of the instant case is manifestly distinct from

the situation as presented in *United States v. Kahriger*, 73 S. Ct. 519, 345 U. S. 22, rehearing denied 345 U. S. 931. In the instant case this appellant denies the constitutionality of the Wagering Tax Act as it imposes penalties in the guise of taxes when applied in the District of Columbia inasmuch as the Congress of the United States had prior to its passage prohibited all forms of gambling covered by the provisions of said Act.¹

In the Kahriger case, *supra*, the Supreme Court merely passed on the constitutionality of the Wagering Tax Act as applied to activities whether legal or illegal *under state law*. At page 512 of that opinion the Supreme Court stated "The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates *state law* . . . ". (Italics supplied) So too, was the position of the United States in that case as is evidenced from a reading of its briefs, excerpts from which are set forth at page 16 of the appellant's brief.

The appellee's second question is "Can the privilege against self-incrimination be raised by one who has not registered for the Occupational Tax Act?" To this the appellant answers "Yes". In support of this answer appellant's contentions are set forth in detail at the bottom of page 23 and pages 24-26 of appellant's brief.

Appellee's third question is "Is the payment of the occupational tax a condition precedent to the engaging in the business of accepting wagers?" To this the appellant answers "No", and appellant's contentions in support of this answer are to be found at pages 17 et seq. of appellant's brief.

¹ See Brief for Appellant, page 10.

ARGUMENT

I. THE WAGERING TAX ACT IMPOSES PENALTIES IN THE GUISE OF TAXES.

1. No Similar Laws Have Been Declared Constitutional.

The appellee states at page 9 of its brief: "The wagering Tax Act is not a penalty in the guise of a tax." The first argument appellee advances in support of the foregoing is "Similar laws have been declared constitutional" . . . and cites a number of cases at page 9 and 10 of its brief in support thereof. The appellant states without fear of contradiction that the Supreme Court of the United States has *never held a similar law to be constitutional*. The pertinent distinction to be kept in mind is that in each and every case cited by the appellee the Congress of the United States had not enacted any legislation prohibiting the activity taxed whereas Congress has prohibited in the District of Columbia all of the activities sought to be taxed by the Wagering Tax Act. For example, the possession of marijuana in the District of Columbia has not been prohibited by Federal law. All that is prohibited is the possession of *untax paid* marijuana that is, the possession or transfer without compliance with the pertinent regulations. The same is true with respect to the other activities taxed by the various acts construed by the Supreme Court in the cases cited by the appellee.

2. The Taxes Collected Pursuant to the Wagering Tax Act Do Not Constitute "Revenue".

The appellee states at page 11 of its brief "The Wagering Tax Act produces revenue . . . ". The appellant does not deny the fact that wagering taxes have been collected by the United States but in this regard it is interesting to note an article appearing in *The Washington Evening Star* on August 27, 1953, which reads as follows:

"Cleveland, Aug. 27. T. Coleman Andrews, Commissioner of Internal Revenue, says the Government gambling tax has proved a flop.

"In an interview yesterday he said enforcement of the wagering tax laws has been too costly and the proceeds too small.

"Returns on the wagering taxes have been extremely disappointing,' Mr. Andrews added, 'the administrative problems posed by the taxes have been enormous and extremely costly.'

"The wagering laws require professional gamblers to buy \$50 occupational stamps and to pay a 10 per cent tax on their gross business."

More recently an article appeared in the *Wall Street Journal* on March 10, 1954, which read as follows:

"The Top Tax Collector would like to see gambling tax laws eliminated.

"Internal Revenue Commissioner Andrews in private talks with lawmakers, has blasted the law that requires gamblers to buy a \$50 'Occupational' stamp and to pay a 10% excise tax on all bets. Mr. Andrews' major complaints: Congress passed the gambling tax law without appropriating funds for enforcement; even if funds were voted, the revenue yield would be tiny; and tax agents are 'wasted' in trying to uphold the gambling tax statute instead of working on regular tax cases where 'real money' could be dug up.

"Gambling tax collections have fallen far short of income predictions made when Congress was considering the levy. During all 1953, the stamp and excise tax take was \$10.5 million. That's about double the 1952 collections, but it's a long way from the \$400 million a year envisioned when the gambling tax was proposed.

"*Commissioner Andrews argues the gambling tax is primarily a 'police statute', rather than a revenue law.*" (Italics supplied)

The foregoing articles reflecting the opinion of Internal Revenue Commissioner T. Coleman Andrews, the one man in the United States who should know most about the Wagering Tax Act, raise the question whether or not this wagering tax in fact is a revenue raising measure. Since

experience has proven that the cost of collections is far beyond the revenue obtained, then there is actually a loss incurred, and if there is a loss it is reasonable to conclude that the Wagering Tax Act is not a revenue raising measure.

Further, the fact that the Act does result in the collection of taxes does not support the conclusion that it is a valid tax act. For example, the tax imposed by the Child Labor Act raised revenue but was nevertheless declared unconstitutional in the *Child Labor tax case*, 259 U. S. 20.

3. The Registration Requirements Are Unconstitutional as Applied in the District of Columbia.

The appellee states at page 12 of its brief "The registration requirements are necessary." In support of this statement it relies on the opinion of the Supreme Court in the *Kahriger* case, *supra*, wherein the Supreme Court in finding that the registration requirements of the Wagering Tax Act are not offensive cited the case of *Sonsinsky v. United States*, 300 U. S. 506 in support of that conclusion. But there is a basic and controlling distinction between the facts in the *Sonsinsky* case and the instant case. In the *Sonsinsky* case the subject taxed was firearms and Congress had not prohibited the activity taxed. Therefore, evidence of the commission of a Federal crime was not essential to the imposition of the tax since the traffic in firearms was not a crime under Federal law. To the contrary in the instant case. Gambling under Federal law in the District of Columbia is a Federal crime. Therefore, evidence of the commission of a Federal crime is essential to the imposition of the taxes imposed by the Wagering Tax Act in the District of Columbia and, accordingly, its provisions are unconstitutional as they impose penalties in the guise of taxes. Further, the registration requirements contravene the Fifth Amendment as is pointed out at length in appellant's brief, pgs. 17-30.

4. The Wagering Tax Act Is Definite and Certain.

The appellee states at page 12 of its brief "The Wagering Tax Act is definite and certain . . .". The appellant has never asserted to the contrary. In fact, the appellant has stated that the provisions of the Wagering Tax Act are quite definite and clear and that they provide that the taxes imposed therein must be paid only by one who is liable for the 10% tax imposed by Subchapter A. That this appellant is not and will not be liable for the 10% tax imposed by subchapter A is fully discussed at pages 8-17 of the appellant's brief.

5. The Supreme Court Has Followed *Kahriger* Only in the Application of Federal Laws as Applied to the States.

The appellee states at page 13 of its brief "The Supreme Court has followed *Kahriger* in subsequent cases . . .". The first case so cited in support of this statement by the appellee is *United States v. Five Gambling Devices et al.*, 74 S. Ct. 190. It should be noted that this case did not construe a statute which imposed a tax. The statute involved was solely a registration statute and the Supreme Court merely held that a dealer in gambling devices need not register if the transportation of the device was wholly intrastate. Interestingly enough, however, Justices Black and Douglas of the majority stated at page 196:

"Holding that the Act requires reports of interstate sales would raise a serious constitutional question. The Act makes it a crime to transport gambling devices in interstate commerce. Consequently, requiring monthly reports of sales and deliveries made by an interstate dealer would require him to make monthly reports of his own crimes. The Fifth Amendment provides that no person shall be compelled 'to be a witness against himself'."

The second case cited is *Irvine v. California*, 74 S. Ct. 381. However, in the light of the *Kahriger* case, *supra*, and more particularly the provisions of the Wagering Tax Act

itself, Sec. 3297, Title 26, U.S.C., the *Irvine* case, *supra*, properly held that a person *in the states* by complying with the registration provisions of the Wagering Tax Act did not obtain a license as far as the state was concerned to engage in the gambling business although the United States would not interfere with his gambling activities since he had registered and paid his federal tax. But Sec. 3297, *supra*, also states that payment of the taxes shall not exempt any person from any penalties provided by a law of the United States. That is the problem. If a license were granted by compliance with this Act as far as the Federal Government is concerned in the District of Columbia, which is the case as far as the Federal Government is concerned in the states, then the registration provisions would be proper. But it is absurd to advance the contention as appellee does, that one must register in the District of Columbia thereby incriminating or tending to incriminate the registrant.

II. APPELLANT'S FAILURE TO REGISTER DOES NOT NEGATE HIS RIGHT TO CLAIM THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The appellee states at page 15 of its brief "Appellant cannot claim the privilege against self incrimination because he has not registered for the tax . . ." It is true that the Supreme Court stated at page 32 of the *Kahriger* opinion:

" . . . Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for . . ."

The violations of law that the Supreme Court had reference to were violations of *state law*. Further, the Supreme Court did not say he could not claim the privilege but said it was difficult to see how, etc., because the registration form as applied to one *in the states* is not incrim-

inatory on its face. And, in relying on *United States v. Sullivan*, 274 U. S. 259, at page 16 of its brief, the appellee has failed to realize that most of the answers called for on income tax return which was involved in that case were not incriminatory on their face and it was for that reason that in that case the Supreme Court stated at page 263 thereof:

"If the form of return provided for called for answers the defendant was privileged from making he could have raised the objection in the return but could not on that Act refuse to make any return at all."

But the Supreme Court went on further to say (Page 264):

"We are not called on to decide what if anything he might have withheld. *Most of the items warranted no complaint . . .*" (Italic supplied)

To the contrary in the instant cause. All of the items on the wagering tax forms warrant the complaint that has been advanced by this appellant, namely, that all call for information which will incriminate or tend to incriminate him.²

² The appellee in a footnote at page 16 of its brief cited two cases for the proposition that Congress has the authority to impose taxes on occupations made illegal under Federal law. *United States v. One Ford Coupe*, 272 U.S. 321, *United States v. Stafoff*, 260 U.S. 477. The appellee has completely misconstrued the holdings of these cases. It has overlooked the fact that the Volstead Act, 41 Stat. 305, which was enacted to enforce the Eighteenth Amendment to the Constitution, made the manufacture, sale, etc., of intoxicating liquors a legitimate business under certain conditions. It only prohibited the manufacture, sale, etc., of intoxicating liquors for beverage purposes. See *United States v. Yuginovich*, 256 U.S. 450, 460. In the *One Ford Coupe* case, *supra*, cited and relied upon by appellee, the Supreme Court merely held that the \$2.20 per gallon basis tax on the manufacture of *all* distilled liquor was valid. However, in *United States v. La Franca*, 282 U.S. 568, 572, the Supreme Court subsequently held that the provisions assessing additional amounts upon evidence of an illegal sale under the National Prohibition Act were unconstitutional as imposing penalties under the guise of a tax. While considering these Prohibition Act cases, the appellant believes it will avoid confusion if it calls to the Court's attention at this moment the language of the Municipal Court for the District of Columbia in its opinion (Joint Appendix, Pages 10-11) pointing out that Section 35 of the National Prohibition Act specifically deleted the provision providing for the issuance of a revenue stamp for any illegal manufacture or sale of liquor. Accordingly, a person engaged in the activity illegal under Federal law was not required to disclose that fact as is however the case under the Wagering Tax Act.

The appellee states at page 16 of its brief:

"The privilege against self-incrimination is a personal privilege which is deemed to be waived unless it is invoked . . ."

With this statement appellant is in full agreement. As was pointed out at page 24-26 of the appellant's brief the privilege must be invoked at the first apprehension of danger. The only way that this appellant could avail himself of the privilege was by refusing to file the registration form and furnish the required information.

The appellee states at page 19 of its brief "... The three judge court held the wagering tax law to be constitutional and that Combs was not entitled to a stamp until he furnished the necessary data", referring to *Combs v. Snyder*, 101 F. Supp. 531, affirmed 342 U. S. 939 (1952). But the fact is that the three judge court did not hold the wagering tax law to be constitutional. In its opinion that Court stated:

"We think the Act constitutional. But we think it unnecessary to discuss the constitutional questions in the circumstances of this case . . ."

And the United States in its brief in the *Kahriger* case in referring to the *Combs* case, stated at page 9 of its brief:

"Copies of the unreported decisions are filed with the Clerk. The Combs decision was based primarily on the doctrine of unclean hands and the Government's motion to affirm was based on that principle."

Therefore, the *Combs* case is no authority for the appellee.

III. THE OCCUPATIONAL TAX IS NOT A CONDITION PRECEDENT TO ACCEPTING WAGERS IN THE DISTRICT OF COLUMBIA.

The appellee states at page 19 of its brief "The occupational tax is a condition precedent to doing business

and, therefore, the privilege against self-incrimination cannot be raised because such privilege only applies to past acts . . .” This argument is thoroughly rebutted at pages 10-15, and page 19 of appellant’s brief. At pages 20-21 of its brief the appellee relies on excerpts from a treatise by Professor Wigmore wherein it is stated that the privilege against self-incrimination applies only to past acts. But the appellant contends that the provisions of the Wagering Tax Act do pertain to past acts, and further, that the discussion by Wigmore has no application in the instant cause for several additional reasons. In one quote from the Wigmore treatise, page 20 of its brief, appellee states:

“ . . . The state announced its requirements to keep the books long before there was any crime; . . .”

To the contrary in the instant case as this Court is well aware of the fact that the Federal criminal laws prohibiting gambling in the District of Columbia antedate the Wagering Tax Act.

Again quoting Wigmore, page 21 of its brief, appellee states:

“ . . . The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence, the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it.”

To the contrary in the instant case. For commission of the Federal criminal act in the District of Columbia is the spark that compels the registration and payment of the taxes imposed.

Again, quoting from Wigmore at page 21 of its brief, appellee states:

“The generalization, therefore, may be made that there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which is a particular

one which may or may not in future be criminal at the choice of the party reporting.” (Emphasis in the text)

It is blatantly clear that this language has no application to the instant cause because there is no choice as to whether the act of accepting wagers in the District of Columbia may or may not in the future be criminal at the choice of the party reporting. The acceptance of wagers is criminal under Federal law in the District of Columbia regardless of any choice of the person reporting. In this regard, the appellee states at page 22 of its brief:

“... No one, including appellant, is required to register for a tax stamp and no compulsion is exerted upon appellant to do so. His is the free choice and free will. The Government does not compel appellant to gamble or to engage in the gambling business. He can choose to register, in which case he must supply the required information, or he elects to refrain from engaging in the business upon which Congress has seen fit to impose a tax. Hence, there can be no self-incrimination. See: *Davis v. United States*, 328 U. S. 582, 590 (1946); *Shapiro v. United States*, 335 U. S. 1 (1948); *United States v. Monia*, 317 U. S. 424; and *E. Fougere & Co. v. City of New York*, 224 N. Y. 269, 120 N.E. 642.”

By this language the appellee has admitted that the Wagering Tax Act lacks the ordinary characteristics of a tax when applied in the District of Columbia. In *Lipke v. Lederer*, 259 U. S. 557, 562, the Supreme Court stated:

“The mere use of the word ‘tax’ in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax Case*, ante 20. When by its very nature the imposition is a penalty, it must be so regarded. *Helwig v. United States*, 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function ‘is to provide for the support of the government’ and clearly

involves the idea of punishment for infraction of the law—the definite function of a penalty. O'Sullivan v. Felix, 233 U. S. 318, 324." (page 561, et seq.)

So, too, the Wagering Tax Act as applied in the District of Columbia. The Wagering Tax Act clearly involves the idea of punishment for infractions of Federal law when applied in the District of Columbia, the definite function of a penalty. Further, a reading of the cases cited by the appellee in this regard compels the conclusion that those cases are not, as the appellee believes, authority for its statement in support of which they are cited. All that those cases held was that in order to do business in compliance with a particular law, certain conditions must be fulfilled and certain records must be kept. As Justice Cordozo pointed out in the *Fougera* case, *supra*, cited by the appellee, no one was required to expose himself to punishment for any offense already committed, but was simply notified of the *conditions under which he may do business*. Compliance gave permission to engage in the business without fear of prosecution for so doing. Properly, therefore, if the person engaged in the business was violating that law and the records would tend to incriminate him of that fact, the privilege was unavailable to him and he could not refuse to produce those records. But in the instant case the appellant does not contend that the registration and payment of the tax and the keeping of records would tend to incriminate him of violations of the Wagering Tax Act. His complaint is that by complying with the Wagering Tax Act he would incriminate himself of violations of other Federal laws rather than being permitted to engage in the taxed activity. Thus, we have a totally distinct situation in the instant case.

1. The Occupational Tax Imposed by Subchapter B of the Wagering Tax Act Applies Only After the Acceptance of a Wager.

The appellee states at page 22 of its brief:

“The occupational tax applies only to future acts . . . ” Contrary to the clear language of the Wagering Tax Act, appellee contends in support of this contention that there is no link between the 10% tax imposed by Subchapter A and the \$50 tax imposed by Subchapter B. In fact, appellee has resorted to calling that portion of the Wagering Tax Act that requires the payment of \$50 and registration the “Occupational Tax Act.” But not so the Congress. Congress added Chapter 27A—Wagering Taxes (new)—to Title 26, U.S.C. by Section 471(a) of the Act of October 20, 1951, 2:07 p.m. E.S.T., c. 521, Title IV, 65 Stat. 531, made effective on November 1, 1951, by Section 472 of the Act of October 20, 1951. This chapter is to be found at 65 Stat. 529. It has three subdivisions: Subchapter A—Tax on Wagers; Subchapter B—Occupational Tax; Subchapter C—Miscellaneous Provisions (Brief for Appellant, pages 33-38). It is obvious from the foregoing that Congress did not enact a separate and distinct Act entitled “Occupational Tax Act” as is contended by the appellee. In addition thereto, the very Congress of the United States which passed this legislation stated that these two sections are integral parts of each other. In H. Report 586, page 60, S. Report 781, page 118, it is stated:

“The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bill provides that a person who pays the occupational tax must, as part of his registra-

tion, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers." (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118) (Italics supplied)

It is thus observed that the Congressional intention was that information demanded by the registration form must be given when a person is liable for the tax imposed by subchapter A.

Further, the futility of the Appellee's endeavor to try to rely on the language of paragraph (A) of Sec. 3294, Title 26, U.S.C., cited by the Appellee at page 23 of his Brief, is manifest at a moment's reflection. All that section does is to impose a tax and fine on a person who fails to comply with the registration taxing provision when he has already taken a wager and is liable for the special tax. This section is simply a penalty provision for a failure to pay *which is not wilful* and means nothing else. This is obvious from a reading of paragraph (C) of Section 3294 which makes provision for *wilful violations*.

The appellee states at page 23 of its brief that Section 3270 of Title 26, U.S.C. was not incorporated in the provisions of the Wagering Tax Act and at page 24 of its brief states that this section was omitted because the Wagering Tax Act has its own registration provisions. With this statement the appellant agrees. But appellant refutes the further statement of appellee at page 24 of its brief wherein it states:

"... However, the incorporation of Section 3271, Title 26, U.S.C., into the Act here in issue is another manifestation of the intent of Congress to compel registration prior to the conducting of the gambling activities upon which the tax is imposed . . ."

In quoting Section 3271, *supra*, the appellee has emphasized the word "until" as evidence of the fact that Congress

intended the registration and payment of the \$50 tax to precede the acceptance of wagers. It is submitted, however, that the emphasis should properly be given to the remaining portion of the section which states:

“ . . . until he has paid a special tax therefor in the manner provided in this chapter.” (Italics added)

So doing, it requires a determination as to what is meant by *“ . . . in the manner provided in this chapter . . . ”*. A reference to the following paragraph of the same Sec. 3271 reveals the following:

“(b) Due date. All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.” (Italics supplied)

To give to subparagraph (b) its proper meaning it is necessary to ascertain what is meant by *“ . . . commencing any trade or business . . . ”*. The Bureau of Internal Revenue has defined what is meant by *“commencing any trade or business”* by Regulation 132, Section 325.42, which states:

“(b) The tax year begins July 1 and ends June 30. Persons commencing business between August 1 and June 30 (both dates inclusive) shall pay a proportionate part of the annual tax. ‘Commencing business’ means the initial acceptance of a wager by a person liable for the 10 percent excise tax or the initial receiving of a wager by an agent or employee for or on behalf of some other person. Persons in business for only a portion of a month are liable for tax for the full month, i.e., a person first becoming subject to the special tax on, for example, the 20th day of a month, is liable for tax for the entire month. As the tax became effective on November 1, 1951, persons in

business on that date or commencing business during that month are liable for the tax for the eight months of the year ending the following June 30." (Italics supplied)

Contrary to the appellee's contention, the foregoing clearly demonstrates that a wager has to be accepted before it can be said that he has "commenced business" and it is only after the acceptance of such a waiver that the liability for the payment of the \$50 occupational tax and registration concurrent therewith is required.

2. Subchapter A is in Issue.

The appellee states at page 25 of its brief "Subchapter A is not in issue . . ." because the appellant is not charged with failing to pay the 10% tax imposed by Subchapter A and states that the unconstitutionality of the Wagering Tax Act is not in issue. In so doing appellee limits the Wagering Tax Act to Sections 3285-3287 of Title 26, U.S.C. but that is not what Congress did, as has been shown at page 11 of this brief. Further, the appellant at pages 10 et seq. of its brief clearly demonstrated the connection between Subchapter A and Subchapter B and at page 10 of its brief stated:

"It is true that an information was not filed against this defendant for violating the provisions of Sec. 3285, Subchapter A, supra . . ."

But at page 11 the appellant stated:

"However . . . the liability for the \$50 tax . . . is imposed only on those who are liable for the tax imposed by Subchapter A . . ."

3. Appellant Can Properly Claim the Privilege Against Self-Incrimination as to a Possible Conspiracy.

The appellee states at page 26 of its brief "Appellant cannot claim the privilege against self-incrimination as to

a possible conspiracy . . .” and in support of this contention states “The privilege against self incrimination is a personal privilege which is exclusively for a witness compelled to testify against himself in a criminal case. Therefore, appellant cannot claim such privilege on behalf of any other person, albeit a co-conspirator . . .”. But contrary to the appellee’s apparent misunderstanding of the contention advanced by the appellant, the appellant is not endeavoring to claim the privilege on behalf of any other person. *He is claiming the privilege on behalf of himself.* As was stated in the opinion of the Municipal Court for the District of Columbia (pages 11-12, Joint Appendix):

“ . . . if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the conspirators applied for a tax stamp, such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction . . .”.

4. Appellant Properly Raises the Fourth Amendment.

The appellee states at page 26 of its brief “Appellant cannot raise the Fourth Amendment . . .”. Appellee then states “. . . It is contended by appellant (Br. at. pp. 30-31) that if he registers and posts the return that his constitutional rights will be violated . . .”. But the brief for the appellant is not so limited. Pages 30-31 of the appellant’s brief states:

“Compliance with the provisions of Chapter 27A, supra, would result in a posting *by the Collector of Internal Revenue pursuant to the provisions of Section 3275, Title 26, U.S.C.* . . .” (Italics supplied)

Then at page 31 of his brief appellant states:

“ . . . Further, Section 3293, Title 26, U.S.C. would require this defendant to post the special tax stamp in his place of business under penalty of Federal law if he fails so to do. The contravention of the Fourth Amendment is made quite apparent by this section for

the very business for which the special tax stamp is issued and required to be posted is unlawful in the District of Columbia . . .”.

A full discussion of the contention that the provisions of Sections 3275 and 3293 of Title 26, U.S.C. contravene the provisions of the Fourth Amendment is set out in detail at pages 30-31 of appellant's brief.

The appellee states at page 26 of his brief that the appellant “has not registered and he has not posted the return and is, therefore, unlike Mr. Irvine who did so register . . .”, referring to *Irvine v. California, supra*. The appellant agrees with the statement of appellee that the appellant is *not like* Mr. Irvine. Mr. Irvine was engaged in wagering activities *in the states*.

But the appellee in discussing further the opinion of the Supreme Court in the *Irvine* case, much to the astonishment of the appellant, states at page 27 of its brief:

“ . . . it is clear that appellant would have no standing to complain about posting his stamp pursuant to 26 U.S.C. § 3293, if he were to register under the Occupational Tax Act . . .”

It is submitted that by this language appellee has conceded one of appellant's contentions, namely, that the Wagering Tax Act is unconstitutional in that compliance with its provisions would incriminate or tend to incriminate him of a violation of Federal law in the District of Columbia. The posting of the Wagering tax stamp in his place of business would put the world on notice, including, particularly, the Metropolitan Police Force and the United States Attorney for the District of Columbia, that the appellant was engaged in a business which is illegal under Federal law in the District of Columbia. The same authorities would likewise be put on notice by the posting in his office which the Collector of Internal Revenue is required to do by virtue of Section 3275, *supra*. But even

more astonishing is the appellee's admission, also at page 27 of his brief, wherein he states:

" . . . Furthermore, the Irvine case is certain authority for the admissibility into evidence of the stamp and the application for such stamp at a trial involving the particular gambling activities involved"

The appellant has at all times argued that the United States would certainly offer the appellant's registration application and purchase of a stamp in evidence in a criminal trial for a violation of the Federal anti-gambling laws in force and effect in the District of Columbia. In fact as the Municipal Court for the District of Columbia stated in its opinion (pages 21-22, Joint Appendix):

" . . . Further, the existence of various Treasury Regulations³ and the policies of the Bureau of Internal Revenue as stated to this court by defense counsel to make the return available to prosecuting officials and not contradicted by the United States lend further basis for the well founded perturbation that this defendant has with respect to compliance with Section 3290.

"It is obvious that compliance would result in his giving to the United States Attorney in this District the best of proof to go further and prosecute him and others associated with him in the business of gambling in the District of Columbia for violation or violations of the District of Columbia Code as well as Section 371 of Title 18, U.S.C. and Sections 1301, 1302 of Title 18, U.S.C."

And in concluding the discussion re the *Irvine* case the appellee states at page 27 of its brief:

" . . . Hence, appellant's objections to the future use of his registration stamp could only be raised at the trial on questions of proof"

³ Treasury Decision 4929, Sections 463C.32, 463C.33, 463.34. Treasury Decision 5138, Section 458.611.

The foregoing certainly reflects that the appellant had reason to fear that compliance with the registration provisions would incriminate or tend to incriminate him of violations of the Federal anti-gambling laws in the District of Columbia. However, even if at a trial for a violation or violations of the Federal laws prohibiting gambling in the District of Columbia the Court were to sustain the objection to the offer of such evidence, such a ruling would not give to the appellant the protection guaranteed by the Fifth Amendment. The mere furnishing of the information called for by the registration form would incriminate or tend to incriminate the appellant because the appellee would be on notice that the appellant was engaged in a business declared illegal by Federal law and would have the leads whereby it could contact the appellant's employees, employers and others to obtain other evidence with which to prosecute him, all in contravention of the Fifth Amendment. *Hoffman v. United States*, 71 S. Ct. 814, 818.

In closing, with respect to the foregoing contention of the appellee, it is submitted that a moment's reflection will clearly disclose the fallacy in the appellee's reasoning. If, at the time of trial, objection were sustained to the admissibility of the application for a wagering tax stamp, etc., such a ruling would of necessity be predicated on the ground that the exhibit and the information contained therein was objectionable because it contravenes the Fifth Amendment. That being true it is likewise obvious that the refusal to furnish the information at the outset was proper. On the other hand, at trial, if the objection to the admissibility of the document was overruled it is submitted that it would be on the ground that the appellant had waived the protection afforded him by the Fifth Amendment by furnishing the information in the first instance. Thus, to say that objection could be raised at trial begs the entire question even though it is not necessary for

this court to dwell at length on this point as it is obvious that the information obtained from the application would certainly furnish leads which would tend to incriminate the appellant of a violation of Federal law in the District of Columbia.

5. The Distinction Between Federal Law and State Law Is Controlling in the Instant Case.

The appellee states at page 29 of its brief "The distinction between federal law and state law is immaterial in the instant case . . .". Thereafter the appellee concedes that the criminal laws enacted by the Congress of the United States with respect to criminal activities are federal laws and that certain gambling activities are prohibited within the District of Columbia by Congressional enactment. But thereafter the appellee states that these concessions are immaterial and in support of this statement relies on the *Kahriger* case. But appellee defeats its own argument by conceding that ". . . state law was then before the Supreme Court . . .". But after so conceding the appellee then states:

" . . . the reasoning and conclusions of such opinion [*Kahriger*] are applicable to the instant case even though the laws of the District of Columbia are involved."

But appellee offers no argument whatsoever in support of this erroneous conclusion! The appellee states again at page 30 of its brief:

" . . . the possibility of incrimination under state law cannot be the basis for claiming the privilege in a federal case . . ."

and in support of this statement cites 13 cases, apparently believing that the appellant contends to the contrary. But such is not the case. Counsel for the appellant knows as well as counsel for the appellee that such is the present

posture of law under the decisions of the Supreme Court. But this appellant is not advancing the claim of possible incrimination *under state law*. In this federal case he is claiming the privilege afforded by the Fifth Amendment in this federal case because of a possibility of incrimination under federal law.

CONCLUSION

The appellee states in its conclusion at page 31 of its brief:

“ . . . Appellant seeks . . . as an unregistered taxpayer, to have this Court, on the basis of assumed facts and hypothetical arguments, overrule and reverse the opinion of the Supreme Court in *United States v. Kahriger*, *supra*; *Combs v. Snyder*, *supra*; and *Irvine v. California*, *supra* . . . ”

This appellant does not now nor has he at any time argued for the reversal of *Combs v. Snyder*, *supra*. As has been pointed out hereinbefore the *Combs* decision did not pass on the constitutionality of the Wagering Tax Act. Nor does this appellant seek a reversal of *Irvine v. California*. Insofar as that case discussed the provisions of the Wagering Tax Act as applied in the states the appellant in no wise disagrees with its holding because the very language of the Wagering Tax Act, namely, Section 3297, put Irvine on notice that compliance with the Federal law would not give him a Federal license nullifying the anti-gambling laws of the State of California. As for *United States v. Kahriger* the appellant states that he now argues and has argued at all times in this cause that the *Kahriger* opinion was determinative solely of the constitutionality of the Wagering Tax Act as applied to gambling activities *in the states* and the question of its constitutionality as applied in the District of Columbia where all the activities taxed have been heretofore made illegal under Federal law was never raised, considered nor passed on.

WHEREFORE, it is respectfully submitted that the opinion and judgment of the Municipal Court of Appeals be reversed.

WALTER E. GALLAGHER,

MYRON G. EHRLICH,

Attorneys for Appellant